SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 539.

A. B. WHITE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WEST VIRGINIA, ET AL., APPELLANTS,

v.

H. C. BERRY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

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1 UNITED STATES OF AMERICA,
District of West Virginia, to wit:

At a circuit court of the United States for the district of West Virginia, begun and held at the court-house in the city of Martinsburg on the 15th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable J. J. Jackson, district judge.

Among other were the following proceedings, to wit:

2 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Bill of complaint.—Filed October 1, 1897.

In the circuit court of the United States for the district of West Virginia, sitting at in said district.

H. C. BERRY
vs.
A. B. WHITE, COLLECTOR OF INTERNAL REVENUE for the district of West Virginia, A. L. Hoult, John D. Sutton, and Anthony Staubly, and Franklin T. Thayer. } In equity.

To the honorable the judges of the said court, your orator respectively shows unto your honor—

First. H. C. Berry was duly appointed by the Secretary of the Treasury of the United States a United States *guager* in 1893, and has been from that time until this such storekeeper of the United States at the Hannis distillery, at Martinsburg, West Virginia, where he has remained from that time until this in said official position.

Second. Your orator would further show that he was appointed to his position as aforesaid through the recommendation of E. M. Gilkinson, late collector of internal revenue for the district of West Virginia, as provided by and act of Congress in such case made and provided.

Third. Your orator would further show that H. C. Berry is paid at the rate of $100 per month direct from the Treasury Department, and that your orator is an officer of the United States Government, and as such has taken the oath of office and executed bonds as required
3 by law, and that said oath of office and bond continues good and in force, regardless of the personnel of the collector of internal revenue for said district, and that he does not hold his position at the discretion or upon the sufferance of the collector of internal revenue.

Fourth. Your orator, further complaining, says that since his incumbency in said office he has honestly, faithfully, and impartially discharged the duties imposed upon him; that he is especially well equipped and qualified to discharge all the duties of said position.

Fifth. Your orator would further show that the defendant A. B. White was duly appointed United States collector of internal revenue for the district of West Virginia, which appointment was duly confirmed

by the Senate, and his commission was duly issued and signed, and he has qualified and taken charge of said office of collector as aforesaid, as provided by law.

Sixth. Your orator further shows that A. B. White, collector of internal revenue as aforesaid, has declared his intention to appoint a *gua*ger and three storekeepers to fill the place of your orator and others therein employed at the Hannis distillery, at Martinsburg, West Virginia, at an early date.

Seventh. Your orator would further show that he has been informed and believes that the defendants A. L. Hoult, John D. Sutton, and Anthony Staubly & Franklin T. Thayer, all four residents of the district of West Virginia, have been reinstated, or will be appointed and commissioned, and one of which will be assigned to duty in the place and in the stead of your said orator at the Hannis distillery, at Martinsburg, West Virginia, through the said A. B. White; that the said A. B. White, collector as aforesaid, has so declared his intention of reinstating the defendants in the place and stead of your orators, and that such intention on his part, your orator has been informed and believe, has been openly made by him, and the public press of the country
4 has so announced. A copy of a clipping of the Daily World, of Martinsburg, West Virginia, of September the 7th, was filed as an exhibit & is in the records of this court, herewith filed and asked to be read as a part hereof, and taken from the State Journal, edited and controlled by the said White.

Eighth. Your orator, further complaining, says that he is a Democrat in politics, and was appointed as a Democrat to said office, and that he voted the Democratic ticket; that the defendant A. B. White is a Republican and was a Republican, appointed to succeed E. M. Gilkinson; and that the said A. B. White has signified and declared his intention to remove from office, or place in his stead, the one of the other four defendants, as aforesaid, because of the fact that your orator is in politics a Democrat, and for no other reason, and appoint and recommend in their stead Republicans, for no other reason that that they are Republicans in politics; and your orator is informed and believe that said appointees so proposed by said White are not eligible to the position.

Ninth. Your orator, further complaining, says that his office as aforesaid is in the classified service and belongs to what is known as the "civil service," and as such *as* your orator can not be removed except for cause shown and proven.

That Department No. 122 provided that "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department, or their appointing officers, of which the accused shall have full notice and opportunity to make defence." Said Department circular is issued and signed by the Hon. L. J. Gage, Sec. of the Treasury, and is filed herewith and ask' to be read as a part hereof; that in Department circular No. 119, which is an Executive order, the same provisions are laid down, together with others, and signed by the Acting Commissioner of Internal Revenue and approved by the Secretary of the Treasury, which said Executive order is herewith filed and asked to be read as a part of this bill.

5 Your orator further shows that he is one of the employes of the Treasury Department; that he is included in the classified service, and protected from removal for political or religious reasons under the civil-service laws and rules of the United States, which will more fully appear by the following copy of a communication received from the Hon. Wm. C. Rice, acting president of the Civil Service Commission, of the date of September 10, 1897, filed and asked to be issued as a part hereof.

Tenth. Your orator, further complaining, say', that if the said A. B. White be permitted to remove your orator from said office and position, or supplant him by others, that it will be illegal and in violation of law. That rule second, section third, of the civil-service rules reads as follows:

"No person in the executive civil service shall dismiss or cause to be dismissed or make any attempt to procure the dismissal of or in any manner change the official rank or position of any other person therein because of his political or religious affiliations." Which provision your orator is informed and charge' is being violated and attempting so to be violated by all of said defendants. Section first of the civil-service rules: "Any person in the executive civil service of the United States who shall wilfully violate any of the provisions of the civil-service act or of these rules shall be dismissed from office.

Eleventh. Your orator further say' that under the law he has a vested interest in said office, and that if the said A. B. White shall remove him therefrom, or assist in so doing, that it will be in violation not only of the civil-service rules, but of his vested interest in said office, for which he can not have an adequate remedy at law, and therefore must appeal to a court of equity and ask its aid to *in*force his rights, which have been guaranteed to him by act of Congress.

Twelfth. Your orator further shows that he is able, competent,
6 and willing to discharge the duties of said office, and is unwilling to be summarily dismissed therefrom for no other reason that that he is of the opposite politics of the said A. B. White, collector of internal revenue, as aforesaid.

Thirteenth. Your orator further shows that said A. B. White, collector as aforesaid, has no power, right, or authority to remove your said orator from said office, or to appoint any other to take his place and thereby effect his removal, and that said defendants, A. L. Hoult, John B. Sutton, Anthony Staubley, & Frank T. Thayer, have no right or authority to take the oath of office and otherwise qualify and actually appear to take the position, and thereby assist in the removal of your said orator, and as there are no vacancies created either by removals or resignations, and there being 15% now commissioned, more than sufficient to perform the duties of storekeepers and *gua*gers in this district, and if they are permitted so to do, it will be in violation of law as well as in violation of the rights and vested interests of this complainant.

Fourteenth. Your orator further says that, unless the said A. B. White be enjoined from removing your petitioner, as he is informed, and believe', and so charge', he will remove your complainant, and that, unless A. L. Hoult, John D. Sutton, Anthony Staubley, & Frank T. Thayer be

enjoined from qualifying as officers of the United States to take the place of your orators at the Hannis distillery in the district aforesaid, they will in *in* this manner effect the removal of this complainant from his office aforesaid, they having expressed their intention to accept said appointments and assignments.

Being therefore remid'less save in your honorable court, the complainant therefore prays that an injunction be granted him restraining and prohibiting the said A. B. White, collector as aforesaid, and all others by and through him, from removing him from the position of *gua*ger until a vacancy is created according to law, as an officer of the
7 United States aforesaid, and also from recommending, assigning, and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfering with your complainant.

Your orator further prays that the said A. L. Hoult, John D. Sutton, Anthony Staubley, & Frank T. Thayer, & all other persons may be enjoined and restrained and prohibited from qualifying as *gua*ger to take the place of your complainant as such officer at the Hannis distillery in Martinsburg, West Virginia, or in any other way aid or assist in the removal of your said orator, or performing or discharging any of the duties of said office, and that all further and general relief may be granted your orator as to equity may seem just and right; and they will ever pray, etc.

And to this end therefor' that the said A. B. White, A. L. Hoult, John D. Sutton, Anthony Staubley, & Frank T. Thayer may be made to make true and perfect answer to this bill.

Your orator further prays that process may be issued requiring the said defendant to appear on a day certain, and make true, full, and perfect answers to this bill, and that all other process, orders, etc., may be had an' entered herein; and they will ever pray, etc.

H. C. BERRY.

FAULKNER & WALKER & GEO. W. JOHNSON,
Solrs. for Plaintiff.

UNITED STATES OF AMERICA,
District of West Virginia, ss:

This day personally appeared before the undersigned authority, whose name is signed to the foregoing bill, and being by him first duly
8 sworn, upon his oath states that he has read said bill and knows the contents thereof, and that the allegations therein contained are true.

Except so far as they are therein stated to be upon information and belief, and so far as they are therein stated upon information and belief, he believes them to be true.

Taken, sworn, and subscribed before me this of September, 1897.

[NOTARY'S SEAL.] GEO. W. JOHNSON,
Notary Public for the Co. of Berkeley & State of W. Va.

EXHIBIT.—*Providing for the enforcement of the provisions of Executive order of July 27, 1897, as to removal from the classified service.*

Department circular No. 122.

Division of Appointments.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., August 11, 1897.

The attention of supervising officers and agents of this Department is called to so much of Executive order of July 27, 1897, as is amendatory of Civil Service Rule II, and provides as follows:

"No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense."

In view of the foregoing, whenever any officer, agent, clerk, or employee in the service of this Department shall appear, to the
9 officer or agent charged with the supervision of his official conduct, to be guilty of such dereliction of duty, delinquency, or misconduct, or shall prove inefficient to such an extent as to seem to justify the removal of such person from the service, or his reduction in grade, it shall be the duty of such supervising officer to immediately forward to this office written charges and specifications, detailing fully and explicitly the reasons for removal or reduction.

At the same time a complete copy of the charges and specifications will be furnished to the accused, with the information that such defense as is desired to be made in the premises must be submitted to the supervising officer for transmission to this office within three days from date of receipt of the copy of the written charges.

Whenever it is impracticable to present a copy of the charges to the accused in person, it will be sent by registered mail and the receipt carefully preserved.

The fact that the accused has been furnished with a complete copy of the charges and informed of the opportunity to make defense, as above set forth, will be reported to this office at the same time that the written copy of the charges is forwarded to the accused as aforesaid.

In the event that the accused fails to mail his written defense to the supervising officer within the time above specified, it will be assumed that such person does not desire to embrace the opportunity thus afforded.

The written defense will be delivered in person when practicable; otherwise it should be forwarded to the supervising officer by registered mail, and, after due examination, immediately transmitted to this office, accompanied by a letter of the supervising officer submitting his views in the matter of the defense, and making such recommendation as the
10 circumstances and the nature of the defense may seem to warrant.

When the circumstances are such as to render it evident that the interests of the service will be better subserved by immediately relieving the accused from duty pending action on the charges, that course will be pursued, in which case the action taken will be promptly reported to this office.

Supervising officers will furnish each officer, agent, clerk, or employee within their respective jurisdictions with a copy of this circular and enforce strict compliance with its provisions.

L. J. GAGE, *Secretary.*

(Endorsed:) Filed in open court Oct. 1, 1897. L. B. Dellicker, clerk.

11 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Restraining order.—Entered September 29, 1897.

H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL., FOR THE district of West Virginia. } In equity.

This cause came on this 29th day of September, 1897, upon the complaint of H. C. Berry in the above-entitled cause, who presented to the court his bill, praying, among other things, that an injunction be granted restraining and inhibiting the defendant, A. B. White, U. S. collector of internal revenue for the district of West Virginia, from recommending the appointment of A. L. Hoult, Jno. D. Sutton, Anthony Staubley, & Frank T. Thayer, or any other person by or through him or them, from removing him from the position of at the Hannis Distillery, in the district of West Virginia, until vacancies are created according to law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal and in any way interfere with the complainant, H. C. Berry, in his said office.

And further that A. L. Hoult, John D. Sutton, Anthony Staubley and all other persons be restrained and enjoined from qualifying as gauger to take the place and position of the said H. C. Berry, at the said distillery in the said district, or in discharging any of the duties of said officer, Berry; and the bill having been inspected and seen by the court, it is ordered to be filed.

12 And thereupon the complainant, Berry, moved for a temporary restraining order, pending said application and motion for an injunction, in accordance with the prayers of his bill, upon consideration whereof the court is of opinion to and doth allow said temporary order.

Whereupon it is adjudged, ordered, and decreed that A. B. White, U. S. collector of internal revenue for the district of West Virginia, be and is hereby restrained, enjoined, and inhibited from recommending, appointing, or aiding in the appointment of A. L. Hoult, John D. Sutton, Anthony Staubley, or any other person, to said position, and from removing the said complainant, Berry, aforesaid, until a vacancy therein is created by law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfere with the said complainant, Berry, in the said office, as aforesaid.

It is further adjudged, ordered, and decreed that A. L. Hoult, John D. Sutton, Anthony Stroubley, and all other persons be, and they are hereby, enjoined and prohibited from acting as *gua*ger in *in* the place and stead of the said complainant, Berry, as aforesaid, or in discharging any of the duties of said office, until the further order of this court.

And it is further ordered by the court, that the service of a copy of this order shall be sufficient service of the notice of the application for an injunction, which is set down for a hearing before the court, sitting at Clarksburg, on Wednesday, the 6th day of October, 1897, and J. C. McMahon is hereby designated to serve this injunction.

13 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Process & marshal's return.

H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL., FOR the district of West Virginia. } In equity.

This cause came on this 29th day of September, 1897, upon the complaint of H. C. Berry in the above entitled cause, who presented to the court his bill, praying, among other things, that an injunction be granted, restraining and inhibiting the defendant, A. B. White, U. S. collector of internal revenue for the district of West Virginia, from recommending the appointment of A. L. Hoult, Jno. D. Sutton, Anthony Staubley, & Frank T. Thayer, or any other person by and through him or them, from removing him from the position of at the Hannis distillery, in the district of West Virginia, until vacancies are created according to law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal and in any way interfere with the complainant, H. C. Berry, in his said office.

And further, that A. L. Hoult, John D. Sutton, Anthony Staubley, and all other persons, be restrained and enjoined from qualifying as *gua*ger to take the place and position of the said H. C. Berry at the said distillery, in the said district, or in discharging any of the duties of said officer, Berry. And the bill having been inspected and seen by the court, it is ordered to be filed.

And thereupon the complainant, Berry, moved for a temporary restraining order, pending said application and motion for an injunction, in accordance with the prayers of his bill, upon consideration whereof the court is of opinion to and doth allow said temporary order.

Whereupon it is adjudged, ordered, and decreed that A. B. White, U. S. collector of internal revenue for the district of West Virginia, be, and is hereby, restrained, enjoined, and inhibited from
14 recommending, appointing, or aiding in the appointment of A. L. Hoult, John D. Sutton, Anthony Stroubley, or any other person, to said position, and from removing the said complainant, Berry, aforesaid, until a vacancy therein is created by law, and from assigning and appointing any person to the same position, and from proceeding in the attempt

to make such removal, and in any other manner interfere with the said complainant, Berry, in the said office, as aforesaid.

It is further adjudged, ordered, and decreed that A. L. Hoult, John D. Sutton, Anthony Stroubley, and all other persons be, and they are hereby, enjoined and prohibited from acting as *gua*ger in *in* the place and stead of the said complainant, Berry, as aforesaid, or in discharging any of the duties of said office, until the further order of this court.

And it is further ordered by the court that the service of a copy of this order shall be sufficient service of the notice of the application for an injunction, which is set down for a hearing before the court, sitting at Clarksburg on Wednesday, the 6th day of October, 1897. And J. C. McMahon is hereby designated to serve this injunction.

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do hereby certify that the foregoing is a true copy of an order entered of record in the cause of vs. A. B. White, collector, et al., on the 29th day of September, 1897.

In testimony whereof I have hereunto set my hand and the seal of said court this 1st day of October, 1897.

L. B. DELLICKER, *Clerk.*

(Endorsed:) Served the within named order on the within named Frank T. Thayer by delivering to him in person an office copy
15 hereof on the 5th day of Oct., 1897, and on A. B. White by delivering to him in person an office copy hereof on the 6th day of Oct., 1897. J. C. McMahon.

(Endorsed:) Filed Oct. 19, 1897. L. B. Dellicker, clerk.

16 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Restraining order.—Entered October 1, 1897.

H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

This cause came on to be heard this 1st day of October, 1897, upon the complaint of H. C. Berry in the above entitled cause, who presented to the court his bill, praying, among other things, that an injunction be granted restraining and inhibiting the defendant, A. B. White, U. S. collector of internal revenue for the district of West Virginia, from recommending the appointment of A. L. Hoult, John D. Sutton, and Anthony Staubley and Frank T. Thayer, and any other person by or through him, from removing him from the position of *gua*ger at the Hannis distillery, in this district of West Virginia, until vacancies are created according to law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal and in any manner interfere with the complainant, H. C. Berry, in his said office.

And further, that A. L. Hoult, John D. Sutton, Anthony Staubley, and Frank T. Thayer be restrained and enjoined from qualifying as *gua*ger

to take the place and position of the said Berry at the said distillery in the said district, or in discharging any of the duties of said officer, Berry. And the bill having been inspected and seen by the court, it is ordered to be filed.

And thereupon the complainant, Berry, moved for a temporary restraining order, pending said application and motion for an injunction, in
17 accordance with the prayers of this bill, upon consideration whereof the court is of opinion to and doth allow said temporary order.

Whereupon it is adjudged, ordered, and decreed that A. B. White, U. S. collector of internal revenue for the district of West Virginia, be, and he is hereby, restrained, enjoined, and inhibited from recommending, appointing, or assisting in the appointment of, A. L. Hoult, John D. Sutton, Anthony Staubley, and Frank T. Thayer, or any other person to said position, and from removing the said complainant, Berry, as aforesaid, until vacancy therein is created by law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfere with said complainant, Berry, in his said office as aforesaid.

It is further adjudged, ordered, and decreed that A. L. Hoult, John D. Sutton, Anthony Staubley, Frank T. Thayer, and all other persons be, and they are hereby, restrained and prohibited from acting as *guager* in the place and stead of the said complainant, Berry, as aforesaid, or in discharging any of the duties of said office, until the further order of this court.

And it is further ordered by the court that a service of a copy of this order shall be sufficient service of the notice of the application for an injunction, is set down for a hearing before the court, sitting at Clarksburg, on Wednesday, the 6th of October, 1897, and J. C. McMahon is hereby designated to serve this injunction.

Enter.

JACKSON, *Judge.*

Oct. 1/97.

18 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Process and marshal's return.—Returned October 4, 1897.

H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL., FOR THE district of West Virginia. } In equity.

This cause came on to be heard this 1st day of Oct., 1897, upon the complaint of H. C. Berry, in the above-entitled cause, who presented to the court his bill, praying, among other things, that an injunction be granted restraining and inhibiting the defendant, A. B. White, U. S. collector of internal revenue for the district of West Virginia, from recommending the appointment of A. L. Hoult, John D. Sutton, and Anthony Staubley, and Frank T. Thayer, and any other person by or through him, from removing him from the position of *guager* at the Hannis Distillery,

in this district of West Virginia, until vacancies are created according to law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any manner interfere with the complainant, H. C. Berry, in his said office.

And further, that A. L. Hoult, John D. Sutton, Anthony Staubley, and Frank T. Thayer be restrained and enjoined from qualifying as *guager* to take the place and position of the said Berry at the said distillery, in the said district, or in discharging any of the duties of said officer, Berry; and, the bill having been inspected and seen by the court, it is ordered to be filed.

And thereupon the complainant, Berry, moved for a temporary restraining order pending said application and motion for an injunction, in accordance with the prayers of this bill, upon consideration whereof the court is of the opinion to and doth allow said temporary order.

19 Whereupon it is adjudged, ordered, and decreed that A. B. White, U. S. collector of internal revenue for the district of West Virginia, be and he is hereby restrained, enjoined, and inhibited from recommending, appointing, or assisting in the appointment of A. L. Hoult, John D. Sutton, Anthony Staubley, and Frank T. Thayer, or any other person, to said position, and from removing the said complainant, Berry, as aforesaid, until a vacancy therein is created by law, and from*m* assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfer' with said complainant, Berry, in his said office as aforesaid.

It is further adjudged, ordered, and decreed that A. L. Hoult, John D. Sutton, Anthony Staubley, Frank T. Thayer, and all other persons, be and they are hereby enjoined and prohibited from acting as *guager* in the place and stead of the said complainant, Berry, as aforesaid, or in discharging any of the duties of said office, until the further orders of this court.

And it is further ordered by the court that a service of a copy of this order shall be sufficient service of the notice of the application for an injunction is set down for a hearing before the court, sitting at Clarksburg, on Wednesday, the 6th of October, 1897; and J. C. McMahon is hereby designated to serve this injunction.

Enter.

JACKSON, *Judge.*

Oct. 1, '97.

(Endorsed:) Served the within order by delivering a true copy thereof to Frank T. Thayer and J. G. Ruckman, in person, in Martinsburg, in the State of West Virginia; to said Thayer on October first, 1897, and to said J. G. Ruckman on October second, 1897. J. C. McMahon.

Subscribed and sworn to before me this 4th day of October,
20 1895.

L. B. DELLICKER, *Clerk.*

21 H. C. BERRY,
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Answer of the defendants, White, Sutton, Staubley, and Thayer.—Filed October 8th, 1897.

In the circuit court of the United States for the district of West Virginia.

H. C. BERRY,
vs.
A. B. WHITE, COLLECTOR OF INTERNAL REVENUE for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubly, and Franklin T. Thayer. } In equity.

The answer of the above-named defendants, White, Sutton, Staubley, and Thayer, to the bill of complaint of above-named plaintiff.

For answer to said bill the defendants say as follows:

1. They are advised, and believe that it is true, that the plaintiff was commissioned by the Secretary of the Treasury of the United States a *guager* in 1893, and defendants are not advised as to the assignment of plaintiff during all the time since, but admit that he was *guager* at the Hannis distillery for a considerable time prior to the 30th day of September, 1897. Defendants say that on the 30th day of September, 1897, the Commissioner of Internal Revenue made an order relieving plaintiff from assignment to duty as *guager* at said distillery, and on the same day telegraphed said plaintiff to that effect. And on the same day the Commissioner of Internal Revenue telegraphed defendant Franklin T. Thayer, assigning him to duty as *guager* at said distillery, and on
22 the 1st day of October, 1897, said Thayer took charge as such *guager*, and was in charge when defendant White, collector, &c., visited said distillery on that day. And said Thayer took charge before 8 o'clock in the morning of said October 1st, and before the granting of the injunction, and before any service upon or other notice of any kind of the granting of or application for said injunction to said Thayer or White or any of the defendants. Defendants say that the recommendation of defendant White to the Commissioner of Internal Revenue, recommending that the plaintiff be relieved from duty, as aforesaid, was made prior to the institution of this suit. That it has been the general policy of the Internal Revenue Bureau to rotate the assignments of storekeepers and *guagers* for the purpose of securing to such storekeepers and *guagers* a fair proportion of employment and for the purpose of preventing collusion between *guagers* and storekeepers and distillery officials, and otherwise protecting the interests of the Government. That plaintiff having been on duty for a long time prior to the 30th day of September, 1897, as *guager* aforesaid, the time had then arrived when it was deemed by the Commissioner of Internal Revenue fair and right among the several *guagers*, and for the best interests of the public service, to relieve plaintiff from assignment to duty at the Hannis distillery aforesaid.

2. Defendants are not advised, and therefore neither admit nor deny, that the plaintiff was appointed upon the recommendation of the late collector, E. M. Gilkeson.

3. The defendants admit that the plaintiff is an officer of the United States, duly appointed and commissioned, and has, so far as the defendants know, executed the bond as required by law. And the defendants further admit that the plaintiff does not hold his position "at the discretion or upon the suffrance of the collector of internal revenue." And the defendants say that the collector of internal revenue has not attempted to exercise any such authority. And defendants also deny that the
23 compensation of said plaintiff has been at the rate of $100.00 per month, but say that he has been paid for his services as *gua*ger by fees at a fixed rate by gallon for the work actually done.

4. The defendant White, collector, &c., denies that the plaintiff is "well equipped and qualified to discharge all the duties of *gua*ger," but, on the contrary, says that from the records of his office and of the Department at Washington for the past three months, during which said White has been collector, that said plaintiff is not a first-class gauger and is culpably careless in his work. And the defendant White says that he has been informed by officials in his office, who were also in said office under the late E. M. Gilkeson, collector, that the plaintiff has been not a well equipped and qualified *gua*ger, but a careless and indifferent officer. And that it was largely because of said information that defendant White recommended to the Commissioner of Internal Revenue that the plaintiff be relieved from duty as *gua*ger at said distillery.

5. The defendants admit that the said A. B. White has been duly appointed and commissioned collector of internal revenue and has qualified and taken charge of said office.

6. The defendants say that the defendant A. B. White, as collector of internal revenue, has never declared his intention to appoint the plaintiff or any one else a storekeeper or *gua*ger, knowing full well and recognizing the fact that storekeepers and *gua*gers are and can be appointed by the Secretary of the Treasury only.

7. The defendants say that the defendant Hoult was reinstated by the Secretary of the Treasury July 9, 1897, as a *gua*ger, in accordance with the laws of the United States and in accordance with the civil-service law, having first been certified as eligible to such reinstatement by the Civil Service Commission. And that the said John D. Sutton
24 was also reinstated August 16th, 1897, by the Secretary of the Treasury as a storekeeper, in accordance with the civil-service law, having first been certified as eligible by the Civil Service Commission. And that the defendant Anthony Staubley was, on the day of August, 1897, reinstated as a storekeeper by the Secretary of the Treasury, in accordance with the civil-service law, having been first certified as eligible to such reinstatement by the Civil Service Commission. And that the said Franklin T. Thayer was, on the 24th day of August, 1897, reinstated as a *gua*ger by the Secretary of the Treasury, in accordance with the civil-service law, having been first certified as eligible to such reinstatement by the Civil Service Commission. That the said Hoult, Sutton, Staubley, and Thayer had all been duly commissioned and executed bonds and qualified prior to the institution of this suit. The defendant White denies that he has ever declared his intention to reinstate any of said officers or assign them to duty in the place of the plaintiff, recognizing fully that he had no such authority. And defendants

further say that neither the defendant Hoult nor the defendant Staubley has been assigned to duty since his reinstatement.

8. The defendant White admits that he is a Republican in politics, and the defendants admit that the plaintiff is a Democrat in politics. The defendant White denies that he ever signified or declared his intention to remove the plaintiff from office or place the defendants or anyone else in his place for the reason that the plaintiff was a Democrat in politics, and for no other reason to appoint or recommend in his stead a Republican.

The defendant White says that in fact and in law he could have nothing to do with the removal or appointment of a storekeeper or a *gua*ger unless it be to recommend the same; that in short the appointments of storekeepers and *gua*gers and their removals can be made only by the Secretary of the Treasury.

The defendants furthermore say that the revocation of assignment
25 complained of by the plaintiff was made by the Commissioner of Internal Revenue, whom the defendants understand is a Democrat.

9. The defendants admit that the office of *gua*ger held by the plaintiff is in the classified service, "and belongs to what is known as the civil service." And the defendants expressly charge that so far as they know the plaintiff has not been removed, but on the contrary still holds the position of United States *gua*ger. The defendants insist that the fact that he has been relieved from assignment to duty at the distillery of the Hannis Distillery at Martinsburg does not remove him from office; that he may be assigned to duty or transferred or nonassigned at any time by the Commissioner of Internal Revenue. The defendants further insist that the plaintiff can not in this manner question the right of the Commissioner of Internal Revenue to assign a United States *gua*ger at a distillery or relieve one who has already been assigned. The defendants further insist that the Commissioner of Internal Revenue has the right to assign to duty a United States *gua*ger, and to determine how long he shall remain on duty under such assignment; and that no law, executive order, or rule or regulation of the Civil Service Commission is violated by the Commissioner of Internal Revenue doing as he has done in this case in exercising the authority conferred upon him by the acts of Congress by assigning a *gua*ger to duty at the said distillery and relieving from duty the plaintiff, who had been theretofore assigned to duty at the same distillery by the Commissioner and by the same act of Congress.

And the defendants further say that no act of Congress, executive order, or rule or regulation of the Civil Service Commission is violated by the collector of internal revenue who, in accordance with the rules and regulations of the Internal Revenue Bureau, recommends for assignment a *gua*ger duly appointed by the Secretary of the Treasury, and who has executed bond and qualified as such.

26 10. The defendants deny that there is any attempt on the part of the said White to remove the plaintiff from office; that, as hereinbefore stated, he claims no such right or power.

11. The defendants, further answering, say that the defendants are not attempting by themselves or to assist any one else to violate any law or civil-service rule or regulation.

12. The defendants further say that no doubt the plaintiff is willing to continue in office, but the defendant White charges, as hereinbefore stated, that the plaintiff is a careless officer, and that if any attempt is or shall be made to remove or dismiss the plaintiff from the service it has not been and will not be made "for no other reason than that" he is "of opposite politics to the said A. B. White, collector of internal revenue."

13. Replying to allegation No. 13 in plaintiff's bill, the defendants again say that the defendant White claims no right or authority to remove the said plaintiff from office or to appoint anyone in his place, and that he never has claimed any such authority. The defendants say that the defendants Hoult, Sutton, Staubley, and Thayer, having been duly appointed to the positions respectively held by each of them by the Secretary of the Treasury, that the right to hold said positions can not be questioned in this or any other collateral proceeding; that the question of whether there were or were not vacancies at the time these appointments were made can not be determined in this suit. Neither of said defendants Hoult, Sutton, Staubley, or Thayer was appointed in place of the plaintiff. The appointment of neither could affect the plaintiff, and whether the Secretary of the Treasury has more of these officers in commission than he is entitled to have under the law is not a question which can be raised by the plaintiff in this suit. It can not be ascertained in this proceeding whether or not 15% or any other number of officers are now in commission more than are sufficient to perform the duties of storekeepers or *guagers* in this collection district. This
27 court, it is respectfully suggested, will not undertake to ascertain the number of distilleries in operation and to be placed in operation in said collection district and the number of storekeepers and *guagers* to be placed on duty at such distilleries. It is submitted that these are questions to be determined by the Treasury Department, and must be supposed to have been determined before such appointments were made, and the appointments made in conformity to the interests and requirements of the public service. Defendants therefore deny that by the appointment of the defendants Hoult, Sutton, Staubley, and Thayer more storekeepers and *guagers* were placed in commission than were sufficient to perform the duties of such officers in said district.

14. The defendants deny that the appointment and qualification of said Hoult, Sutton, Staubley, and Thayer will make necessary the removal of the plaintiff. The defendants, further answering, say that the defendant Hoult was on the day of , 1889, appointed a U. S. *guager*; that on the day of , 1893, after having served about four years, and there having been a change of Administration, he was removed from said position through no delinquency or misconduct of his; that during the late war of the rebellion he served in the military service of the United States, and was honorably discharged therefrom; that availing himself of Rule IX of the civil-service regulations, he made application to the Secretary of the Treasury to be reinstated to the position from which he had been removed; that defendants are informed that said petition, together with the requisition of the proper officer of the Treasury Department, were referred to the Civil Service Commission, and his eligibility having been properly certi-

fied by said Commission, he was reinstated and reappointed by the Secretary of the Treasury. Said petition was originally filed with E. M. Gilkeson, late collector of internal revenue, and, together with
28 the recommendation of said collector, forwarded to the Commissioner of Internal Revenue. The defendants insist that in making said appointment or reinstatement the Secretary of the Treasury acted in strict conformity with the acts of Congress and the rules and regulations of the Civil Service Commission. The defendants Sutton, Staubley, and Thayer were similarly reinstated and reappointed as storekeepers and guager. The defendant A. B. White says that the recommendation made by him to the Commissioner of Internal Revenue relative to the plaintiff was made prior to or on the 29th day of September, 1897, and the said recommendation was made in part because the said plaintiff had been on duty for some time, and in part for the reasons hereinbefore stated. Said defendants further say that they believe and charge that the reinstatement and appointment of said defendants Hoult, Sutton, Staubley, and Thayer were not made by the Secretary of the Treasury for political reasons, nor was the plaintiff relieved from duty as aforesaid at the Hannis distillery by the Commissioner of Internal Revenue for political reasons, nor the said Thayer assigned to duty at the said distillery for political reasons.

And having fully answered, defendants ask to be hence dismissed with their costs. And, as in duty bound, they will ever pray, &c.

A. B. WHITE,
Collector of Internal Revenue, District of West Virginia.
A. L. HOULT,
ANTHONY STAUBLY,
FRANKLIN T. THAYER.

JOHN W. MASON,
JOSEPH H. GAINES, *U. S. Attorney,*
For Defendants.

STATE OF WEST VIRGINIA,
County of Harrison, to wit:

29 A. B. White, one of the defendants named in the foregoing answer, being first duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information, and so far as they are therein stated to be upon information he believes them to be true.

A. B. WHITE.

Taken, subscribed, and sworn to before me this 8 day of October, 1897.
L. B. DELLICKER, *Clerk.*

STATE OF WEST VIRGINIA,
County of Berkeley, to wit:

John D. Sutton and Franklin T. Thayer, two of the defendants named in the foregoing answer, being first duly sworn, say that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information, and so far as they are therein stated to be

upon information they believe them to be true, except that said Thayer says that he was at the Hanis distillery to take charge as *guager* on the 1st day of October, 1897, between 10 and 11 o'clock a. m., instead of 8 o'clock, as stated in the answer.

JOHN D. SUTTON.
F. T. THAYER.

Taken, subscribed, and sworn to before me this 19th day of October, 1897.

U. S. G. PITZER,
Notary Public.

(Endorsed:) Circuit court U. S., Dist. W. Va. Filed in office this 8th day of October, 1897. L. B. Dellicker, clerk.

30 In the circuit court of the United States for the district of W*set* Virginia.

H. C. BERRY, PLAINTIFF,
vs.
A. B. WHITE, COLLECTOR, ET AL., DEFENDANTS. } In equity.

Replication to answer.—Filed Oct. 19, 1897.

H. C. BERRY, PLAINTIFF,
vs.
A. B. WHITE, COLLECTOR, ET AL., DEFENDANTS.

This repliant, H. C. Berry, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto saith that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied to, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath alr*a*edy prayed.

H. C. BERRY,
By FAULKNER & WALKER,
Sol's for Complainants.

(Endorsed:) Filed Oct. 19, 1897. L. B. Dellicker, clerk.

31 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Demurrer to bill.—Filed October 8, 1897.

In the circuit court of the United States for the district of West Virginia.

H. C. BERRY
vs.
A. B. WHITE, COLLECTOR OF INTERNAL REVENUE for the district of West Virginia, A. L. Hoult, John D. Sutton and Anthony Staubley, & Franklin T. Thayer. } In equity.

The demurrer of the above-named defendants, A. B. White, collector, &c., John D. Sutton and Anthony Staubley, and Franklin T. Thayer to the bill of the above-named plaintiff.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint to be true, in such manner and form as the same are therein set forth and alleged, do demur to said bill, and for cause of demurrer show—

1. That it appears by the plaintiff's own showing in this case that he is not entitled to the relief prayed by the bill against these defendants.

That the appointment to and removal from public office under the Government of the United States is not a ministerial act, but an executive act, and as such not subject to regulation or control by the courts.

3. That the powers of the Federal Government are divided among the legislative, executive, and judicial departments, and no authority or right to control or regulate any one of the powers is vested in either of the other two.

32 4. That the plaintiffs has no vested right in his position. He does not hold it by any tenure, and therefore has no such property right therein as would give him standing in a court of equity to ask the relief of the court by injunction.

5. That a bill of injunction lies only to protect a property right.

6. That an injunction ought not to be granted restraining the defendant A. B. White from appointing to or removing from said office, because the power to remove and to appoint to said office is not vested in said defendant A. B. White. But the power to appoint storekeepers and guagers is vested by law in the Secretary of the Treasury alone, and the power to fix their compensation is vested in the Commissioner of Internal Revenue under the limitations prescribed by law. (See Internal Revenue Laws, sections 3153, 3156, and 3157.)

7. That the power to assign guagers and storekeepers to duty at any given place, and to terminate such assignment is vested by law in the Commissioner of Internal Revenue.

8. That the bill is based upon misconception of the laws relative to the powers of the Secretary of the Treasury, the Commissioner of Internal Revenue and collectors as contained in Revised Statutes, sections 3153, 3154, 3155, 3156, 3156a, 3163, 3163a. (See also U. S. Internal-Revenue Regulations and Instructions, pages 35, 120, 121.)

9. That it does not appear from the bill that the defendants Hoult, Sutton, and Staubley and Thayer are not eligible to appointment and assignment under the civil-service law to the positions they are sought to be enjoined from taking.

10. That it does not appear from the bill that the defendants Hoult, Sutton, and Staubley and Thayer had not already been appointed to such positions, and had not already qualified at the time the bill was filed.

11. That there can be no vested right in a *guager* or store-
33 keeper to any particular assignment to duty. The right to change the particular assignments to duty of *guagers* and storekeepers at will is vested in the Commissioner of Internal Revenue alone, and the exercise of that right does not affect and is not affected by the civil-service law.

12. That the act of Congress known as the civil-service law is unconstitutional.

13. That even if said act is constitutional it does not give to the plaintiff a right to invoke the aid of a court of equity, even to prevent his removal from office, and much less to prevent a change in his assignment to duty. And, even if constitutional, said act does not give the court authority to restrain in any manner the exercise of executive discretion, but leaves the appointing power untrammelled, save by moral and executive restraints, and the fear of indictment for a violation of the act.

14. Where discretion is vested by law in an executive officer concerning matters purely executive, he can not be controlled in the exercise of such discretion by the courts, but must be left free in the first instance to exercise such discretion as he may see fit, although the results of his exercise of discretion may be subject to judicial review, and the officer himself subject to punishment for the manner in which he has exercised such discretion.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, the defendants do demur thereto; and they pray the judgment of this honorable court whether they shall be compelled to make any answer to the said bill; and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

JOHN W. MASON,
JOSEPH H. GAINES, *U. S. Atty.*,
Counsel for Defendants.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JOSEPH H. GAINES,
34 *Of Counsel for Defendants.*

STATE OF WEST VIRGINIA,
County of Harrison, to wit:

A. B. White, one of the above-named defendants, on his oath, says that the foregoing demurrer is not interposed for delay.

A. B. WHITE.

Sworn to before me, this day of October, 1897.

(Endorsed:) Circuit court U. S., dist. W. Va. Filed in office this 8th day of October, 1897. L. B. Dellicker, clerk.

35 In the United States circuit court for the district of West Virginia.

H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Joinder in demurrer.—Filed Oct. 19, 1897.

H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL.

And the said H. C. Berry, the complainant, says that the said bill in equity and the matter therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said defendants to answer the same and the said complainant is ready to verify and prove the same as the court shall hereby direct and award.

H. C. BERRY,
By FAULKNER & WALKER,
Sol's for Complainants.

(Endorsed:) Filed Oct. 19, 1897. L. B. Dellicker, clerk.

36 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order removing cause to Martinsburg, and giving leave to amend bill if amendment be deemed necessary.—Entered October 6, 1897.

H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

This cause having been set for hearing this 6th day of October, 1897, upon the motion of the complainant for an injunction to be made absolute, restraining and inhibiting the defendant White, and other defendants named in the bill, and all other persons from removing the complainant or revoking his assignment as *guager* at the Hannis distillery in the district of West Virginia, or in any way interfering with him in his said position as *guager*. And the defendants not being fully advised at this time as to the defence they desire to make, it is ordered that this cause be set down for hearing on the 18th day of October, 1897, at Martinsburg, and the preliminary injunction heretofore awarded in this cause be continued until the further order of this court; and, in the meantime, the defendants are required to file any and all pleading on or before the 9th day of October, 1897, it being agreed by counsel that, if the defendants wish to do so, they may file both demurrer and answer at the same time, and leave is given to the complainant to join in the demurrer, and to file exceptions to the answer, or take issue thereon, as he may elect.

And it is further ordered that, in the event the answer discloses such a state of facts as to render it necessary for him to amend his bill, then the further leave is given him to file on or before the 14th of October, 1897, his amended bill, and each side is allowed until the 18th to file affidavits in support of their respective rights.

Enter. JACKSON, *Judge.*

Oct. 6, 1897.

37 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order allowing guager to be assigned temporarily from some other district.—Entered October 7, 1897.

H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, &C., ET AL. } In equity.

In circuit court of the United States for the district of West Virginia, at Clarksburg sitting.

It being suggested to the court by the counsel of A. B. White, collector of internal revenue for the district of West Virginia, and defendant in this case, that there exists a pressing necessity for removing the whiskey in bond now in the bonded warehouse of the Hannis distillery, at Martinsburg, and the said defendant being the collector of the district and being entrusted under the law with the supervision of this distillery, and he having, by the direction of the Commissioner of Internal Revenue, suspended the running and all other operations of the distillery, now, upon his motion made in open court, it is ordered that the injunction heretofore allowed in this cause, on the first day of October, 1897, is so modified as to permit a *guager* to be taken from some district other than the district of West Virginia, to *guage* the whiskey in bond and to discharge such other duties as may be necessary to remove the whiskey from the bonded warehouse of the said distillery. But this order is in no wise to affect the rights of the plaintiff in this cause, but the status quo of the parties is to be preserved, it being the purpose of this order only to permit the removal of the whiskey now in bond; nor is the plaintiff to be disturbed in his legal possession of the rights and
38 privileges of his position, but merely permit the *guager* selected temporarily to perform such duties as may be necessary to remove the liquor in bond, and for no other purpose.

(End'rsed:) Enter. Jackson, judge. Oct. 7, 97.

39 H. C. BERRY *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order authorizing appointment of temporary guager and storekeeper pending the proceedings in this suit.—Entered October 12, 1897.

WILLIAM BUTLER *vs.* A. B. WHITE ET AL. } In equity.

J. G. RUCKMAN *vs.* A. B. WHITE ET AL. } In equity.

H. C. BERRY *vs.* A. B. WHITE ET AL. } In equity.

A. B. White, esq., the collector of internal revenue for this district, having represented to the court that there exists an actual necessity for a *gua*ger to *gua*ge spirits that may be manufactured into the bonded warehouse of the Hannis Distillery Company, and also that there is a necessity for an additional storekeeper to weigh in grain and to attend to meal rooms, etc., in connection with the operating of distillery, and unless authority is given to employ these additional laborers he will be unable to let the distillery be run, it is therefore ordered that leave be granted to him to employ the additional *gua*ger and storekeeper that he desires, pending the proceedings upon the injunction in this court. But this order is in no wise to affect the rights of any of the parties interested in these proceedings.

(Endorsed:) Enter. Jackson, judge. Oct. 12/97.

40 H. C. BERRY *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of H. C. Berry.—Filed October 21, 1897.

In the circuit court of the United States for the district of West Virginia.

H. C. BERRY *vs.* A. B. WHITE, COLLECTOR, ET AL. }

This day, H. C. Berry, complainant in the above bill, personally appeared before me, a notary public in and for the county of Berkeley, State of West Virginia, and made oath as follows:

That I am the complainant in the above-entitled cause; that I was appointed *gua*ger by the Secretary of the Treasury in June, 1893, and

have qualified as such by taking the oath of office and executing bond; that I was performing the duties of said office when the bill in this case was filed and the injunction granted by the Honorable J. J. Jackson, judge of said court; that it is true, as set forth in the answer of the defendant, White, that I received a telegram, purporting to come from the Commissioner of Internal Revenue, dated the 30th day of September, 1897, and received by me on the evening of that day, a true copy of which is hereto filed and marked Exhibit "A," and asked to be taken as a part of this affidavit; that on the 2nd day of October, 1897, after the service of process of injunction on some of the defendants, I received what purported to be a telegram from the Commissioner of Internal Revenue, a true copy of which is herewith filed and marked Exhibit "B," and asked to be read as a part of this affidavit, but this affiant denies as true the statement, in said answer contained, that the defendant, Frank-

41 lin T. Thayer, whom said answer alleges was assigned by the Commissioner of Internal Revenue to the position of gauger at the Hannisville distillery, entered upon the performance of said duties on the 1st day of October, 1897. This affiant avers that on that date he still had possession of the property of the Government as gauger, as well as the keys which as such gauger it was his duty to hold; that it is not true that the said Thayer took charge of said office at 8 o'clock on the 1st day of October, but this affiant avers that about 5 minutes to 11 o'clock on the 2nd day of October, 1897, that the said Thayer came out to the distillery, and after asking me whether I was the gauger in charge, introduced himself to me, and handed me a telegram purporting to come from the Commissioner of Internal Revenue, assigning him as gauger at said distillery. The affiant then asked him whether he had come to that place for the purpose of entering upon the duties and to take charge of the property belonging to the office. He said he did not know, but that seemed to be his instructions. This affiant replied that if he would answer in the affirmative they would settle their matters in 5 minutes. He declined to answer, but stated that Collector White the evening before had told him to come out to the distillery that morning with the view of entering upon his duties as gauger, but that at the time he received these instructions from Collector White, he had not been served with the injunction papers, and that he had better go up town and communicate with the collector and Commissioner of Internal Revenue.

This affiant avers that from that time to the present the said Thayer has not sought or attempted in any way to perform the duties of said office, nor did he at any time prior to said conversation hereinbefore detailed.

This affiant admits that he is paid by the number of gallons that he gauges, but he avers as true the statement in said bill contained that his compensation runs from $42.00 per month to $135.00 per month; and that taking the whole year it will average about $100.00 per month.

42 This affiant avers that the records of the office of Commissioner of Internal Revenue and that of the collector for the district of West Virginia will prove his competency as a gauger and his efficiency as an officer. That during the last three months referred to in the

answer of defendant, White, these records will show a monthly average of at least 80 reports made by me on forms # 59, 176, and 179, making 240 reports for the period stated, covering withdrawals or reguaging of from 2 to 50 bbls. embraced in each report, and that his accuracy and correctness has been such that not a single report has been returned to him during that time for correction, either by the Commissioner of Internal Revenue or the collector for the district. He therefore avers that he is able and efficient in the discharge of his duties, and not careless during the period alleged in said answer.

Your affiant further avers that in addition to the reason stated in said bill why he believes he was recommended for removal by the defendant, White, collector, and was removed by the Commissioner of Internal Revenue, was because he was a Democrat in political sentiments and views. The following conversation between the said White and this affiant took place on Monday the 4th day of October, 1897, at the internal revenue office at the said Hannisville Distillery; the said White was at the time preparing a telegram to be sent to the Commissioner of Internal Revenue, when the following conversation occurred between them:

The said White remarked: "You can talk and maintain your position; you are not afraid?" And I replied: "Yes; this is not a personal matter between us, but a political one, it seems." He answered: "Yes; it is a political one. If it had not been for the pressure on me we would not have had this trouble." He further remarked, in the same conversation: "We would have had possession if you had not had a United States Senator and a deputy marshal present."

43 This affiant further avers that in Parkersburg, on the 1st of July, 1897, in a conversation at his office, said defendant, White, remarked, after I said I would like to know where I would land, and if I was to be put out would like a little notice. He asked me if I was a Democrat. I said, "Yes." He replied: "You know, Berry, I am a Republican, and will put in my own people as fast as I can. I will give you reasonable notice before I displace you, if I can get you out."

And further this affiant sayeth nothing.

H. C. BERRY.

Subscribed and sworn to before me this 18 day of October, 1897.

[NOTARY'S SEAL.] GEO. W. JOHNSON,
Notary Public.

EXHIBIT A.—*Copy of telegram.*

[Received at 2.45 p. m., Sept. 30th, 1897. Dated Washington, D. C., 30.]

To H. C. BERRY, Esq.,
Martinsburg, W. Va.:

You are hereby relieved from duty as U. S. *guager* at the Hannis Distilling Co., and will turn over all Government property in your possession to Franklin T. Thayer, who has been directed to relieve you from duty on the 1st proximo.

(Signed) W. S. FOREMAN,
Commissioner.

EXHIBIT B.—*Copy of telegram.*

[Received at 6.05 p. m. Oct. 2nd, 1897. Dated Washington, D. C., 2nd.]

To H. C. BERRY,
U. S. Guager, Martinsburg, W. Va.

44 You are hereby suspended from duty as U. S. *gua*ger until further orders, and you will turn over all Government property to Storekeeper James G. Ruckman, in charge of warehouse. This is for gross insubordination.

(Signed) W. S. FOREMAN,
Commissioner.

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

45 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of C. J. Faulkner.—Filed October 21, 1897.

H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } Affidavit.

In the circuit court of the United States for the district of West Virginia.

This day C. J. Faulkner personally appeared before me, a notary public in and for the county of Berkeley, State of West Virginia, and, after being first duly sworn, deposeth and says: That on the morning of the 2nd day of October, 1897, between the hours of 10 and 11 o'clock a. m., he received a telephone message requesting him to come out to the Hannisville distillery, in the town of Martinsburg, West Virginia; that in response to said message he drove out there, and after being out there a few minutes F. T. Thayer came out to the distillery, and a short time after the arrival of Mr. Thayer H. C. Berry appeared at the distillery, bringing with him a letter addressed to Mr. Ruckman, which authorised him to act as additional storekeeper at said distillery. When Mr. Berry came in Mr. Thayer spoke to him and asked him whether he was the *gua*ger. He stated that he was. He then showed Mr. Berry a telegram from the Commissioner of Internal Revenue assigning him as *gua*ger at the Hannisville distillery. Mr. Berry then propounded to him this question: "Have you come out here this morning to take possession of this office and the property of the Government now in my possession as *gua*ger?" Mr. Thayer responded that he understood such to be the order of the Commissioner, but that he didn't know whether it would be proper for him to do so. Mr. Berry replied: "If you will answer my question in the affirmative, we can settle this matter in 5 minutes." Mr. Thayer then said that the collector had told him the evening before to come out to the distillery and take possession of the office, but at the time he had received these instructions he had not been served with the
46 injunction order issued in the case of H. C. Berry vs. A. B. White, collector, et al., and that he therefore felt it his duty before

doing anything further to communicate with the collector and Commissioner of Internal Revenue. Mr. Thayer then arose from his seat and left the office and grounds of the distillery.

CHAS. J. FAULKNER.

Subscribed to and sworn to before me this 20th day of October, 1897.

[NOTARY'S SEAL.] GEO. W. JOHNSON,
Notary Public.

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

47 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of James G. Ruckman, for plaintiff.—Filed October 21, 1897.

H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } Affidavit.

James G. Ruckman, being first duly sworn, deposes and says as follows: That he has been a United States storekeeper since August, 1893; that he has been on duty nearly all of that time at the Hannisville distillery, Martinsburg, W. Va.; that he has seen Mr. Frank Farnsworth, an expert commercial *gua*ger of many years' experience, test many & many packages of spirits which had been *gua*ged by H. C. Berry, U. S. *gua*ger, trying to find some mistake in said *Gua*ger Berry's work; that in every such test case *Gua*ger Berry's work was found to be correct in every respect. Deponent further states that he has seen other *gua*gers at work; that he never saw another *gua*ger who could *gua*ge as many barrels of spirits in a given time as can *Gua*ger Berry; that from his own knowledge and observation concerning *gua*ging, he considers H. C. Berry an accurate, competent, and very efficient *gua*ger; that from information obtained from experienced men in the employ of The Hannisville Distilling Company, he believes said Berry to be one of the best *gua*gers ever assigned to duty at that distillery; that he has never known *Gua*ger Berry to make but very few mistakes in his *gua*ging, but that sometimes in copying his report said *Gua*ger Berry made clerical errors.

J. G. RUCKMAN.

Subscribed to and sworn to before me, in my county, this 18 day of Oct., 1897.

GEO. W. JOHNSON,
Notary Public.

48 (Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

49 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of A. B. White, collector.—Filed October 21, 1897.

A. B. White, being first duly sworn, says that he is one of the defendants in the chancery cause of H. C. Berry vs. A. B. White and others, now pending in the circuit court of the United States for the district of West Virginia; that the assignment of said Berry as gauger at the Hannis distillery was not revoked by this affiant, but that it was revoked by Hon. W. S. Forman, Commissioner of Internal Revenue, on the 30th day of September, 1897, to take effect at the close of business of that day, and the said Berry notified thereof by telegraph; that the defendant F. T. Thayer was, on said 30th day of September, 1897, assigned to duty as such gauger at said Hannis Distilling Company by Hon. W. S. Forman, Commissioner of Internal Revenue, to take effect on the first day of October, 1897, and that said Thayer was notified of said assignment by telegram on the said 30th day of September, 1897, and reported for duty at said distillery on the morning of the first day of October, 1897, and that affiant found said Thayer at said distillery on the first day of October, 1897, ready to perform any official duty required of him at the same.

And affiant further says that he had nothing to do with said assignment or revocation of assignment except to recommend same to his superior officer, the Commissioner of Internal Revenue, and that he did not recommend the revocation of the assignment of said Berry or the assignment of said Thayer for political reasons.

A. B. WHITE.

Taken, subscribed, and sworn to before me this 18th day of
50 October, 1897.

U. S. G. PITZER,
Notary Public.

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

51 H. C. BERRY
vs.
A. B. WHITE ET AL. } In equity.

Affidavit of A. B. White, collector.—Filed October 21, 1897.

In the circuit court of the United States for the district of West Virginia.

H. C. BERRY
vs.
A. B. WHITE ET AL. } In equity.

A. B. White, being first duly sworn, one of the defendants in the above cause, now pending in the circuit court of the United States for the district of West Va., says that he has read the affidavit of plaintiff Berry and in reply thereto says:

That plaintiff Berry was not at the distillery October first, so far as affiant can learn, and that the orders of the Commissioner to him were

for him to turn over any Government property in his possession to defendant Thayer on October first; that said plaintiff received his orders September thirtieth, and purposely evaded his duty until the second day of October. Affiant says, however, that said Berry had no property in his possession necessary to turn over to defendant Thayer to complete said Thayer's assignment. Affiant avers that said Thayer, between ten and eleven o'clock October first, reported at the distillery for duty and had there been withdrawals to make would have done the necessary *gua*ging. Affiant White saw *Gua*ger Thayer duly and completely installed as gau*a*ger at the distillery on October the first. Affiant avers that the conversation had by plaintiff with defendant Thayer on October second, after the injunction had been served on said Thayer on the night of October first, was simply an unsuccessful endeavor to bring said Thayer into contempt of this court.

52 Affiant again avers that repeatedly letters have been received from the Commissioner of Internal Revenue concerning errors made by *Gua*ger Berry and that he is culpably careless in his work and has entailed much work and annoyance to the collector thereby. Affiant denies the accuracy of the interview between plaintiff and affiant of October fourth as sworn to by plaintiff alleging that politics caused "this trouble" and affiant did not speak of the "pressure" on him as a political one; affiant did not recommend the revocation of plaintiff's assignment for a political reason.

Affiant also states that the conversation held July first with said plaintiff was distinctly stated by him to be without any consideration of the matter of storekeepers and *gua*gers, and that affiant had not had time to look into the law or consider changes of storekeepers and *gua*gers.

Affiant again denies that he has violated any law*m*, rule, regulation, or edict of the President, Congress, the Civil Service Commission, or his superior officers of the Treasury Department.

A. B. WHITE.

Subscribed and sworn to before me this 19th day of October, 1897.

JASPER Y. MOORE,
Clerk D. C. U. S., D. W. Va.

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

53 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of G. W. Wilson, Act. Com. of Int. Rev.—Filed October 21, 1897.

In the circuit court of the United States for the district of West Virginia.

H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

WASHINGTON, *District of Columbia:*

G. W. Wilson, being first duly sworn, says that he is Acting Commissioner of Internal Revenue; that W. S. Forman, Commissioner of

Internal Revenue, is in the State of Illinois, and he has been in Illinois continuously for the last three weeks.

Affiant further says that he knows of the revocation of the assignment of the plaintiff as a gauager at the Hannis distillery and the assignment of Franklin T. Thayer in the place of plaintiff, and the causes and circumstances thereof, the same having come within affiant's knowledge in the regular course of his official duties; that neither said revocation or assignment was made for political reasons, or because of the political or religious opinions or affiliations of either the plaintiff or the said Franklin T. Thayer, but for other reasons involving the good of the service; and the said revocation and assignment were made by the Commissioner.

G. W. WILSON,
Acting Commissioner Internal Revenue.

Subscribed and sworn to before me this 19th day of October, A. D. 1897.

JOHN T. BIVINS, *Notary Public.*

54 [Telegram.]

EXHIBIT ONE.

[Received at 2.54 p. 1897. Dated Washington, D. C., Sept. 30th.]

To FRANKLIN T. THAYER, Esq.,
Grafton, Va.:

You are assigned to duty as U. S. *gua*ger at the Hannis Distilling Co., Martinsburg, W. Va., effective to-morrow morning.

W. S. FOREMAN,
Commissioner.

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

55 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of Franklin T. Thayer.—Filed October 21, 1897.

Franklin T. Thayer, being first duly sworn, one of the defendants in the cause of H. C. Berry vs. A. B. White and others, now pending in the circuit court of the United States of West Virginia, says that he is a United States *gua*ger for the district of West Virginia, duly appointed and assigned; that he was appointed *gua*ger on the 24th day of August, 1897, and has remained in office continuously ever since; that on the thirtieth day of September, 1897, he received a telegram from the Commissioner of Internal Revenue assigning him to duty as such *gua*ger at the Hannis distillery in Martinsburg, W. Va., which said telegram is herewith filed as part of this affidavit, marked "Exhibit one"; that, in accordance with said order of assignment, he came to Martinsburg that night, arriving in Martinsburg early in the morning of the first day of October. On the morning of the first day of October he reported to

said distillery for duty and remained there during the day, ready to perform any official duty required of him; that during the day he met Collector White at the distillery and showed him the said telegram and told him that he was then ready for duty; that he remained on duty until he received, on the night of October first, the copy of the order in this cause enjoining and prohibiting him from further acting as such guager at said distillery.

F. T. THAYER.

Taken, subscribed, and sworn to before me this 18th day of October, 1897.

U. S. G. PITZER, *Notary Public.*

(Endorsed:) Filed in open court October 21st, 1897. L. B. Dellicker, clerk.

56 H. C. BERRY *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order docketing cause at Martinsburg.—Entered October 22, 1897.

This day came the plaintiff, by Messrs. Faulkner & Walker, his attorneys, and presented to the court the original papers in the above-entitled cause, together with a duly certified transcript from the circuit court of the United States for the district of West Virginia, sitting at Wheeling, remitting said cause to this court; and on his motion it is ordered that said cause be docketed herein.

Enter.

JACKSON, *Judge.*

Oct. 22, '97.

57 H. C. BERRY *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order continuing injunction.—Entered October 22, 1897.

H. C. BERRY *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

In the circuit court of the United States for the district of West Virginia, sitting at Martinsburg, W. Va.

This case having been set for hearing on the 18th day of October, 1897, upon the motion of the complainant to have the injunction made absolute, and restraining and prohibiting the defendant White and other defendants named in the bill, and other persons, from removing the complainant or revoking his assignment as guager at the Hannis distillery, in the district of West Virginia, or in any way interfering with him in his said position as guager, and upon the bill and exhibits filed by the

complainant and the answer and demurrer by the defendants, and exhibits filed therewith, and affidavits filed, respectively, by the complainant and defendants, under agreement between the parties that the court consider both demurrer and answer, with the supporting proof, upon the motion for an absolute injunction, and was argued by counsel.

And the court not being ready at this time to pass upon the questions involved in the consideration of the motion, but the court desiring to take time for the consideration of the same, it is therefore ordered that the preliminary injunction heretofore awarded in this cause be continued until the further order of this court.

And A. B. White, esq., collector of internal revenue for this district, having represented to the court that the Hannis Distilling Company have notified him of their desire to commence full operations and to run said distillery both day and night, and that in order that the interest
58 of the Government might be properly protected, it is necessary that there should be 4 storekeepers and 1 additional *guager* assigned to duty at said distillery temporarily until the court can pass upon the questions involved in the 3 suits of H. C. Berry, J. G. Ruckman, and William Butler against A. B. White, collector, et al., which by agreement of parties has been heard by the court together, it is ordered that the injunction heretofore granted be modified to the extent of allowing the assignment of 4 storekeepers in all and 2 *guagers* in all to the Hannis distillery, none of whom hold commissions as storekeepers and *guagers*, or as such are assigned by the Commissioner of Internal Revenue from the district of West Virginia; but this provision shall have no application to J. G. Ruckman as storekeeper under the authority which he is exercising at the present time under the directions of the Commissioner of Internal Revenue, and none of the defendants to this suit shall be assigned to the said positions pending the further consideration of these causes by the court, and this order is not in anywise to affect or impair the rights or change the status quo of the parties interested in these proceedings.

Enter.

J. J. JACKSON, *Judge*.

OCTOBER 22, 1897.

59 H. C. BERRY, PLAINTIFF,
vs.
A. B. WHITE, COLLECTOR, ET AL., DEFENDANTS,
and
WILLIAM BUTLER, PLAINTIFF,
vs.
A. B. WHITE, COLLECTOR, ET AL., DEFENDANTS,
and
J. G. RUCKMAN, PLAINTIFF,
vs.
A. B. WHITE, COLLECTOR, &C., ET AL., DEFENDANTS.
} In equity.

Opinion.—Filed Nov. 8, 1897.

These causes are now heard upon the bills of plaintiffs and the demurrers and answers of defendants, which, by stipulation of counsel, are heard together.

The object and purpose of the bills is to restrain the defendant from removing the plaintiffs in this action from their present positions as gauger and storekeeper, respectively, in the Hannis distillery or transferring them to any other and subordinate positions in the same distillery.

These officers were commissioned by the Government and assigned to duty, and were in the active discharge of the functions of their respective offices when the defendant White was appointed collector of internal revenue for the district of West Virginia.

It is alleged in the bills that this defendant is about to remove the plaintiffs in these actions upon political grounds, and it is claimed that neither the defendant nor the appointing power has the right or power to remove the incumbents from their offices for political reasons.

The demurrers to the bills in these cases raise fourteen grounds of objection, which may all be embraced in three points.

First. Is the act of Congress known as the civil-service act, passed in 1871 and as amended in 1883, constitutional?

In considering this question it is well to refer to the history of the country which finally led to the passage of this act. The learned counsel who argued these cases on behalf of the plaintiffs reviewed, to some extent, the action of the various Administrations of this Government from that of Washington down to 1820, when Congress passed an act fixing, for the first time, the tenure of office for district attorneys and marshals of the United States. Prior to this time it appears that removals from office were comparatively few and that such action, when had, was always for causes other than political.

After the passage of the act of 1820, subsequent Administrations began to make changes in that class of officers who held their positions at the pleasure of the Executive. As the country grew, not only in territory but in population, the thirst and greed for office became so great that a growing necessity was felt that some legislation should be had to correct, as far as possible, the evils growing out of the existing system of appointments. Such was the condition of the public mind of the country that President Grant, one of the greatest men that ever occupied the Presidential chair, felt it incumbent on himself in his annual message of December 4th, 1870, to call the attention of Congress to the importance and necessity of reform in "the manner of making all appointments." He employs the following strong and striking language in his message, from which I quote:

"Always favoring practical reform, I respectfully call your attention to one abuse of long standing which I would like to see remedied by this Congress. It is a reform in the civil service of the country. I would have it go beyond the mere fixing of the tenure of office of clerks and employes who do not require 'the advice and consent of the Senate' to make their appointments complete. I would have it govern, not the tenure, but the manner of making all appointments. There is no duty which so embarrasses the Executive and heads of departments as that of appointments, nor is there any such arduous and thankless labor imposed on Senators and Representatives as that of finding places for constituents. The present system does not secure the best men, and often not even fit men, for public place. The elevation and purification of the civil service of the Government will be hailed with approval by the whole people of the United States."

In pursuance of this recommendation of President Grant, Congress, on the 3rd day of March, 1871, passed an act the purpose and object of which, amongst other things, was "to regulate admissions to the civil service." It appears, however, that this act was insufficient to accomplish the purposes for which it was framed. Its terms and provisions were so criticised that there was a consensus of opinion that further legislation was needed. President Arthur, influenced no doubt by the public sentiment of the country, felt it his duty in his annual message of December 4th, 1882, to the Forty-seventh Congress, to call the attention of that body to this subject, in which he employed the following language: "I trust that before the close of the present session some decisive action may be taken for the correction of the evils which adhere in the present method of appointment, and I assure you of my hearty cooperation in any measures which are likely to conduce to that end."

After this recommendation of President Arthur, Congress took up the subject and promptly passed an act "to regulate and improve the civil service of the United States," which was approved by the President on the 16th day of January, 1883. Bills were introduced in both Houses of Congress, but the bill that was passed by the Senate, after much discussion in the House, was passed by the House and approved by the President. In the discussion that took place upon this bill in the Senate, some of the most distinguished lawyers of that body participated, among whom were Senator Hoar, of Massachusetts; Senator Edmunds, of Vermont; Senator Brown, of Georgia; Senator George, of Mississippi; Senator Ingalls, of Kansas; Senator Cockerell, of Missouri, and Senator Allison, of Iowa. I refer to the utterances of these distinguished lawyers as part of the cotemporaneous history of this act, and it is to be observed that not one of these gentlemen entertained any doubts as to the constitutionality of this act, but the general trend of the discussion seems to have conceded its constitutionality. The utterances of both Senator Hoar and Senator Edmunds maintain its constitutionality, and the skeptical legal mind that differs with me and entertains doubts as to the constitutionality of the act is referred to the able discussions that took place at the time it was under consideration. This court might well content itself with what it is has now said, but I am not either without authority or precedent upon this subject. The Constitution of the United States, article 1, section 2, paragraph 18, confers upon Congress the right "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Under this provision of the Constitution, Congress, as early as the 27th day of July, 1789, passed an act that "the head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." That act has been in force from the day of its passage to the present time. Here is a power conferred by the authority of Congress upon the head of each department, and is in no sense a delegated power of legislation. The evident purpose of Congress was to furnish each department with

authority to regulate the conduct of its officers and employes and the distribution and performance of the business of the office. If such a power to legislate had been delegated under that act, the courts of this country would long since have been invoked to pass upon the power of Congress to delegate a power to the head of any department which alone belonged to it; but long acquiescence in the act is of itself sufficient evidence of the right of Congress to pass it. Judge Marshall, in his opinion in the case of McCulloch vs. State of Maryland, 4 Wheaton, 430, uses the following language, which I think appropriate to the discussion of the question under consideration:

"All must admit that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

In the case of Ex parte Curtis, 106 U. S., 371, this doctrine was again affirmed by the Supreme Court of the United States, in an opinion delivered by Chief Justice Waite, in which he uses the following language:

"That the Government of the United States is one of delegated powers only, and that its authority is defined and limited by the Constitution, are no longer open questions, but express authority is given Congress by the Constitution to make all laws necessary and proper to carry into effect the powers that are delegated. (Art. 1, sect. 8.) Within the legitimate scope of this grant Congress is permitted to determine for itself what is necessary and what is proper."

I assume that when Congress passed these acts it did determine for itself what was necessary and what was proper; that there was a necessity to remedy the evil growing out of the existing appointments to office, and that the acts passed were constitutional and therefore proper. Is it not competent and clearly within the legitimate scope of the powers of Congress, under the Constitution, to remedy an existing evil? If so, did Congress in the passage of these acts exceed its legitimate power under the Constitution? I think not. Under our system of Government Congress by law is vested with the power alone to remedy existing evils; but it is the duty of the Executive, when Congress by an act applies a remedy, to see that the act is faithfully enforced. When Congress undertakes to apply a remedy to an evil by repealing an existing law, or by amending the law, or by the passage of an act which has for its object an improvement of the civil service of the country, can it be said that Congress has exceeded its power? I think not. If the time should ever come in the history of this Government when Congress can not regulate the administration of the civil service of the country, in my judgment it will be an untoward event which will strike at the very foundation of the existence of the Government.

I reach the conclusion that there can be no question as to the constitutional power of Congress to pass these acts. In support of this position

I cite article 1, section 8, clause 18, of the Constitution of the United States; Marbury v. Madison, 1 Kranch, 137; McCulloch v. Maryland, 4 Wheaton, 421; Ex parte Hennnen, 13 Peters, 259; Ex parte Curtis, 106 U. S., 371; United States v. Perkins, 116 U. S., 483.

61 The second ground of demurrer is that the assignment or revocation of assignment of these parties to duty is not protected by the provisions of the civil-service law or the regulations in pursuance thereof.

It is urged that the plaintiffs hold positions not technically in the executive civil service. I can not agree with this position. Rule 3, section 1, of the revised rules promulgated May 6th, 1896, declares "that all that part of the executive civil service of the United States which has been or may hereafter be classified under the civil-service act, shall be arranged in branches, as follows: The departmental service, the custom-house service, the post-office service, the Government printing service, and the internal-revenue service."

Storekeepers and gaugers are appointed by the Secretary of the Treasury, and are required by the statute to take an oath to faithfully perform the duties of their offices and to give bond for the faithful discharge of their duties. The storekeepers are to receive a compensation not to exceed four dollars a day, to be determined by the Commissioner of Internal Revenue, and are not permitted to engage in any other business while in the service of the United States without the written permission of the Commissioner of Internal Revenue. The fees of gaugers are to be determined by the quantity gauged, under such regulations as the Commissioner may prescribe.

These places held by the plaintiffs are positions of honor and trust, and have attached to them a fair compensation. It is true that their duties are ministerial, yet the faithful discharge of them is so important to the Government as to require men of capacity and integrity. Section 6 of the same rule declares that "the internal-revenue service shall include officers and employes in any internal-revenue district who have been, or may hereafter be, classified under the civil-service act." By the direction of the President, the Secretary of the Treasury classified all persons not before classified in the internal-revenue service, except those merely employed as laborers or workmen and those whose appointments are subject to confirmation by the Senate, and made report to the Commission in pursuance of rule 12, section 1. It must be apparent that gaugers and storekeepers are either "officers or employes" in the internal revenue department, and it is immaterial whether they are officers or employes. In either event they are protected under the rules of the civil service, as they do not fall within the exception of rule 12, section 1.

The Acting Commission' of Internal Revenue, Mr. G. W. Wilson, reported to the Commission the classification of the internal-revenue service, which was approved by the Secretary of the Treasury. A provision of section 7 of the act is, that after the expiration of six months from the passage of the act "no officer or clerk shall be appointed, and no person shall be employed to enter, or be promoted, in either of the said classes now existing, or that may be arranged hereunder, pursuant to said rules, until he has passed an examination or is shown to be specially exempted from such examination, in conformity herewith." But this act

provides for certain exceptions, one of which is that persons who have been honorably discharged from the military or naval service are not required to be classified under this act. By rule 3, section 1, the internal-revenue service was placed in the classified service, and under section 6 there was included "the officers and employes in any internal-revenue district who have been, or may hereafter be, classified under the civil-service act." As we have seen, section 7 forbids the appointment of a person, after the expiration of six months from the passage of the act, until he has passed an examination or is shown to be specially exempt from such examination in conformity with its provisions. The plaintiffs in these actions having been more than six months in possession of the offices from which it is now sought to remove them, no person can be appointed or employed to take either of said positions except as provided for in section 7, unless they fall within the exception to rule 9.

But it is claimed that the assignments made to take the places of the plaintiffs in these various actions do fall within the exception to rule 9, which provides that "a vacancy in any position which has been, or may hereafter be, classified under the civil-service act may, upon requisition of the proper officer and the certificate of the Commission, be filled by the reinstatement, without examination, of any person who, within one year preceding the date of said requisition, has, through no delinquency or misconduct, been separated from a position included within the classified service at the date of said requisition, and in that department or office and that branch of the service in which said vacancy exists."

The answer to this position is, that there are no vacancies, and until vacancies occur, under the rules of the civil service no assignments can be made. In the cases before us there are no vacancies in these positions, either by death or resignation, nor can there be vacancies by removal unless they are in conformity with the civil-service act and the rules and regulations made under it. But it is insisted that this is not a removal but a transfer, and that under the provisions of section 3154, passed August 15th, 1876, the Commissioner may transfer any gauger or storekeeper. That section provides that "the Commissioner may also transfer any inspector, gauger, storekeeper, or storekeeper and gauger, from one distillery or place of duty or from one collection district to another." This section is mandatory and binding upon every officer of the United States who comes within its terms, but it does not authorize the appointing power to make the changes proposed by the defendant collector. It is obvious, from the reading of that section, that it only authorizes the Commissioner to transfer the officers mentioned in it from one place of duty to another place of duty in the same district, or from one collection district to another. It does not in express terms say that you may transfer the officers mentioned in it from one position to another in the same distillery. It was evidently the intention of Congress, in the enactment of this clause of that section, to permit transfers as I have
62 indicated; but there is no provision for the reducing of a man in the grade or position that he has held. Congress evidently supposed that if it became necessary to remove or reduce a man for incompetency to a lower position in the same grade, that the appointing power might exercise the power of removal, but since the passage of the civil-service act that power of removal is now limited and controlled by it,

which, being a subsequent act to section 3154, so far as they are in conflict with each other limits and controls the Commissioner in his action. It is idle to say, as in the instance of Ruckman, in this case, that where he has held the position of "head or day storekeeper" that he can be changed or transferred from that position to that of "additional storekeeper," which is a change in rank, without nullifying the civil-service act and the rules in force under it. A transfer of this character from the "head or chief position" to a secondary position, as that of "additional storekeeper" necessarily must be, is a change of rank in a public position, which is necessarily a removal, that can only be made under the civil-service act and the rules formulated under it. Can it be said that a transfer or assignment in the same distillery from one position to another does not operate as a removal from one position to the other?

Is not the position from which the officer is transferred vacated, and is he not placed in a new position? What can be the object and purpose of a transfer unless it is to remove the incumbent from the position he occupies? As we have before said, these officers held their positions before and at the time the present collector was appointed and entered upon the discharge of his duties on the 1st day of July, 1897. It is obvious from what appears in these cases that the present collector is attempting to secure a change in positions or a revocation of assignments of these officers, and to substitute others in lieu of them. If there were vacancies in these offices, of course he would have the right to make recommendations to the Commissioner to have persons appointed to fill the vacancies; but there are no vacancies, and none can be created except in the case of death or resignation or in conformity to the civil-service act and the rules promulgated under it. It has been held that an appointment to an office operates as a removal of the then incumbent. An office, when once filled, can not be deemed vacant until the term of service expires or until the death or removal or resignation or abandonment of the incumbent. (5 Waite's Act. & Def., sect. 14; Keenan v. Terry, 24 Texas, 253; Johnson v. Walker, 2 N. H., 202.)

By a provision of section 2, clause 2, of the civil-service act, their positions can only be filled by selection, according to grade, from amongst those graded highest as the result of competitive examination. It is true that by a provision of rule 9 certain exceptions are made to that rule, and it is claimed that these parties fall within the exception because they have heretofore held these positions and seek to be reinstated therein. If, however, there were vacancies, the appointments to fill the positions, to be legal, should be made in pursuance of section 2, clause 2, in connection with the exceptions contained in rule 9; but there is no pretense upon the part of the appointing power that they ever intended to comply with those provisions of the law. The effort to remove these officers seems to be in violation of the Executive order of July 27th, 1897, amendatory to civil-service rule 2, which provides that "no removal shall be made from any position subject to competitive examination except for just cause, upon written charges filed with the head of the Department or other appointing officer, of which the accused shall have full notice and an opportunity to make defense." The present incumbents hold positions of honor and trust, which positions, I hold,

are within the provisions of the civil-service act and the rules formulated and adopted in pursuance of it. If I am correct in this position, then these incumbents could only be removed in the manner provided for by that act and the Executive order of July 27th, 1897. It seems to me no grounds have been shown for their removal execept "for the good of the public service." This is a reason that was employed by the officers of the Government when they desired to remove any one that was obnoxious to them long prior to the passage of the civil-service act. It is too general, vague, and indefinite to authorize the removal of an officer under existing law. By the very terms and provisions of the rule just referred to, he has to be confronted with the charges that are made against him and to have full notice and an opportunity to make defense. No charges of a specific character have been preferred against these officers; no notice has been served upon them of any charge; and no opportunity has been furnished them to meet the vague and indefinite charge, "for the good of the public service." The very object and purpose of the rule which was promulgated on the 27th day of July, 1897, was to furnish a full opportunity to every officer who was within the civil service to meet any charges made against him. This has not been done in this instance, and I must hold that under the rules formulated by the President and the Civil Service Commission, and promulgated by that Executive order, that the effort to remove the officers in question is illegal. The rules promulgated by the President and the Commission are clearly within their scope and power under the act of Congress, and when they exercise the power to limit and restrict the power of removal as they deem best for the public interest, it is only the execution of a duty imposed upon them by Congress, and which should be effectually performed and fully complied with.

To my mind it is clear that storekeepers and gaugers are
63 employes of the Government that are protected by the rules and regulations promulgated under the civil-service act by the Executive and the Commission; that a revocation of the assignments, or transfer of the plaintiffs in these actions, is in effect a removal, and that a removal for political reasons falls within the inhibition of the civil-service act and the rules promulgated under it; that there can be no appointment to any position unless there is a vacancy, and that the vacancy must be filled in conformity to the provisions of the civil-service act and the rules made under it.

The third ground of demurrer is that a court of equity can not enjoin an officer or party from exercising the power of removal.

I have heretofore discussed this question in the case of Priddie v. Thompson, United States marshal for this district, and although some of my brothers have differed with me in the conclusions I reached in that case, yet I have seen nothing emanating from them to shake my convictions. (Fed. Rep., Nov. 2, 1897.) In discussing a grave and important question of this character, it is well sometimes to have recourse to first principles. Story, who is a standard authority, says that "equity has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence where a plain, adequate, and complete remedy can not be had in the courts of common law." (1 Story Eq., 12 Ed., sect. 33; 1 Cooper's Eq. Pl., 128, 129; Medford's Pl. in Eq., by Jeremy, 122, 123; 1 Wood's Lectures, 7, pp. 214, 215.)

"The remedy must be plain; for if it be doubtful and obscure at law, equity will assert jurisdiction. It must be adequate; for if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity." Accepting this definition as not only precise but descriptive of the powers of a court of equity, does not the case under consideration fall within the jurisdiction of such a court? In the bills filed in these cases it is alleged that the plaintiffs have not only an interest in, but a right to, the possession of the offices they hold, and their emoluments, and to that extent a vested right of which they cannot be deprived except by operation of law, and not by the capricious action of a superior officer. Has not a person who holds and is in possession of an office to which there is a fair salary attached to remunerate him for his services a right to the protection of the law to prevent an injury to him by the doubtful assertion of the rights of another as to his office? Has he not a material interest in the possession of the office and the salary attached to it? If he has such an interest in the office and emoluments, is there not a right which should be recognized and protected by the law in the employment of it? The fact that another party desires and seeks the office is evidence of its value to him, and if it is valuable to the one seeking it, surely it must be to the one holding it. If no value was attached to the position, there would be no occasion for these proceedings. The fact that they have been instituted to protect the incumbents in the enjoyment of their offices is conclusive evidence that there are some rights involved.

What, then, is the most complete remedy afforded? The plain answer to this question is that the only remedy that is adequate and complete must be of a preventive character which seeks to restrain the defendants from ousting the plaintiffs from their positions. There can be no legal remedy for the reason that the incumbents, when once ousted from their positions, have no recourse whatever. The plaintiffs are entitled to a preventive remedy to preserve the "status quo" until the titles to the different positions and offices can be settled by some legal proceeding. Equity alone furnishes that remedy, and if this remedy does not exist, then there is a case of an alleged wrong without a remedy. In the progress of a civilization that is giving us railroads, telegraphs, telephones, and numberless other things, all of which are regarded as necessary to both our business and social life, it often becomes necessary to invoke the latent powers of our jurisprudence as a necessity arises which requires it. This jurisdiction is only the application of existing powers in a court of equity to a new case. Courts of equity have exercised their jurisdiction permitting officers de facto of a school district to restrain persons claiming to be officers de jure, but are not in possession, from taking possession of a schoolhouse, and from interfering with the officers de facto in the employment and management of school affairs. (Braidley v. Sweetland, 13 Ks., 41.) The question involved in these proceedings may be said to be analagous to the case just referred to. This injunction is to restrain the defendants from interfering with the plaintiffs in the possession of their offices and is in no sense to try the right of possession or title to the offices. Proceedings by injunction cannot be used for that purpose. I think the foregoing views are clearly sustained by Story's Equity Jurisprudence. But I do not rely upon text-books alone to support my views as to this position. In Waite's Actions and Defenses there will be found

many references where courts of equity have exercised this jurisdiction where there was a controversy between parties claiming the same office. It will never be assumed to oust a person from an office under a color of title until his right to such office has been determined; but it will be exercised to protect a party in the possession of his office until he has been ousted by a legal proceeding. In a well-considered case
64 by the supreme court of Louisiana it was held that an officer cannot be dispossessed by a third person whose title he disputes until the latter shall first try the disputed right, and the learned judge who delivered the opinion of the court cites the case of Braidley v. Sweetland, 13 Ks., 41; Palmer v. Foley, 45 How. Pr., 110. The reason is very obvious that a claimant cannot take the law in his own hands, even with the assistance of others, to oust an incumbent in advance of judicial termination of the disputed right, and that court held that "the claimant and all others may be properly enjoined from interference with the party in possession of the office until the dispute can be judicially settled." (Guillotte v. Poyney, 5 L. R. A., 403.) In the case of Ex parte Sawyer (124 U. S., 402), Chief Justice Waite, referring to the remedy by injunction, uses the following language, which seems to support the view I have taken of the question under consideration: "I can easily conceive of circumstances under which a removal, even for a short period, would be productive of irremediable mischief. Such cases may rarely occur, and the propriety of such an application may not often be seen, but if one arises, and if the exercises of the jurisdiction can ever be proper, the proceedings of the court in due course upon a bill filed for such relief will not be void even though the grounds upon which it is asked may be insufficient." The law as thus laid down by the learned Chief Justice in the case cited would seem to dispose of the question under consideration.

In the case of Marbury v. Madison, 1 Cranch, 167, Chief Justice Marshall uses the following language: "But where a specific duty is assigned by law and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy." Specific duties in the cases of these plaintiffs are assigned to them by law, viz, the duties of gauger and storekeepers. The "individual rights" or the rights of the owners of the distillery to which they have been assigned for duty depend to a great extent upon the faithful performance of their duties. They claim to have an "individual right" in the offices they respectively hold, and they conceive themselves to be injured in their rights when there is an effort to remove them from their positions. Under the authority of the cases cited I hold that they have a right to resort to the courts of their country for a remedy. If they can not resort to the courts for a preventive remedy to stay the hand of the appointing power in removing them from their positions, then they have no remedy, although the act of the appointing power may be in violation of the civil-service act and the rules made under it. It can not be said that where Congress by its act has undertaken to limit and restrain the appointing power and the appointing power attempts to nullify the plain provisions of the act that there is no remedy. High on Injunctions says that "the plaintiff says: 'I am the actual incumbent in possession of the office to which I claim to be legally entitled. Defendant,

claiming under a title the validity of which I dispute, is seeking to oust me extrajudicially, in which effort he will have the aid of my fellow members on the board, and I ask judicial aid to protect my incumbency to the position until defendant shall, in due course of judicial procedure, establish his right and title.' Such an action fails within a well-recognized branch of relief by injunction. While courts of equity uniformly refuse to interfere by the exercise of their preventive jurisdiction to determine questions relating to the title to office, they frequently recognize and protect the possession of officers de facto by refusing to interfere with their possession in behalf of adverse claimants, or, if necessary, by protecting such possession against the interference of such claimants, and the granting of an injunction in such a case in no manner determines the question of title involved, but merely goes to the protection of the present incumbents against the interference of claimants out of possession and whose title is not yet established." (2 High on Injunctions, 2 ed., sec. 1315.)

It is said by the learned judge who delivered the opinion of the supreme court of Louisiana, supra, that the doctrine as laid down by High "is in the interest of social peace and order and conforms to the object and policy of the law in all remedial provisions for the settlement of disputed rights which always respect and maintain the status quo until the controversy shall be settled in the orderly course of judicial procedure." "Plaintiff," he says, "is undoubtedly the de facto officer, because he claims the office and is in possession of it, performing the duties under color of appointment." (Waite's Ac. & Def., page 7, paragraph 9; Buckman v. Ruggles, 15 Mass., 180; Commonwealth v. McCombs, 56 Pa., 436; State v. Howe, 25 Ohio St., 588; Braidey v. Therett, 17 Ks., 468.)

A recent work entitled American and English Decisions in Equity, vol. 3rd, page 440, lays down the principles and quotes the authority to sustain it: "* * * the actual incumbent of an office, whether de jure or de facto, if duly qualified and in office by virtue of a certificate of election issued by the proper officers, will be protected by injunction against unlawful interferences with his possession thereof. Brady vs. Sweetland, 13 Kas., 41; Braidy vs. Therett, 17 Kas., 468; 65 Guillotte vs. Poicy, 41 La. An., 33; Palmer vs. Foley, 45 How. Pr. (N. Y.), 110; State vs. Superior Court of Snohomish Co. (Wash.), 48 Pacific Rep., 741; as by illegally electing another in his stead; Wheeler vs. Bd. of Fire Comrs., 46 La. An., 731; or by removing him without authority; Armitage vs. Fisher, 74 Hun. (N. Y.), 167. It will also sometimes interfere to protect the interests of the public; e. g., when two different bodies claim to act as the common council of a city; Kerr vs. Trego, 47 Pa., 292."

The plaintiffs in these actions are all officers de facto if not de jure, claiming the possession of their offices and performing the duties under color of appointment. I therefore reach the conclusion that the plaintiffs have a right and interest involved in the offices they hold, and that that right and interest is questioned by the defendants in these cases, and that the only legal remedy they have to protect themselves in the enjoyment of their various offices as against those who are seeking to oust them is the restraining power of this court to prevent interferences with their

possession until the titles to the offices have been settled by due course of law. It follows from what I have said—

First. That the act known as the "civil-service act" is constitutional.

Second. That Congress has not delegated to the President and the Commission legislative powers.

Third. That by rule 3, section 1, the internal-revenue service has been placed under the civil-service act and rules made in pursuance of it.

Fourth. That the plaintiffs in these actions are officers of the Government in the internal-revenue service.

Fifth. That they can not be removed from their positions except for causes other than political, in which event their removal must be made under the terms and provisions of the civil-service act and the rules promulgated under it, which, under the act of Congress, became a part of the law.

Sixth. That the attempt to change the position and rank of the officers in these cases is in violation of law.

Seventh. That a court of equity has jurisdiction to restrain the appointing power from removing the officers from their positions if such removals are in violation of the civil-service act.

For the reasons assigned the demurrers to the bills will be overruled.

I come now to consider the defense raised by the answers other than the questions of law, which were disposed of on the demurrers. The main question for consideration is a question of fact. The contention of the defendants is that they were not served with the injunction before the Commissioner had attempted to vacate the positions of gauger and storekeeper by the transfer or assignment of others to the positions of Ruckman, Butler, and Berry. From the answer of Collector White, as well as from his affidavit and the affidavits of the Commissioner, it appears that there was for some reason hasty action in regard to these officers. The action by the Commissioner was taken by him on the evening of September 30th, by wire, when he notified the plaintiff Ruckman of his transfer and the plaintiffs Butler and Berry of the revocation of their assignments. The collector claims that he was present on the morning of October 1st to execute the telegraphic order of the Commissioner. As we have before said, these plaintiffs, being officers of the Government, were not removable at the will or caprice of the Commissioner, and the Commissioner, also being an officer of the Government, his action in this matter must conform to the law and not be in violation of it. The evidence does not show that the Commissioner sent any commissions to the defendants Thayer and Sutton, who were assigned to take respectively the offices of gauger and head storekeeper, before the time that they were served with the notice of the injunction restraining them from interfering with the possession of the incumbents. No officer in charge of an official position would be justified in turning over his position to his successor until that successor had appeared with his commission and taken the oath and given bond as required by law. The evidence does not disclose that a single one of any of these prerequisites of the law had been complied with before the service of the injunction. It is very apparent that what was done in regard to these removals was done in haste. One thing is clear both from the answer and the affidavit of Collector White—that he does not deny the fact that he knew of the intended application for an injunction or that the

injunctions had been allowed. This is a significant fact, tending to show either that he was very ignorant of what was going on or that he carefully avoided committing himself either as to the application or the pendency of the injunction. But he must have known of the allowance of the injunction in the Butler case, which was allowed in term time, in open court, on the 29th day of September, and the evening of the very next day there was an attempt to transfer Ruckman and to revoke the assignment of Berry. It can not be doubted that he knew of the Butler injunction, for a copy of the process was left with his wife at his residence on the 29th day of September, as shown by the marshal's return; hence his attempt to have Ruckman transferred and Berry's assignment revoked before they secured injunctions, though he had recommended their appointments on the 27th to the Commissioner. If he knew of the allowance of the injunctions he was bound to respect them as much 66 as if he had been served with notice. Upon the question of notice and service of the order of injunction there is some conflict in the evidence. I will consider the evidence in the cases of Butler and Ruckman together, as the same affidavits apply to both cases. Ruckman, who was head storekeeper, swears that he did not surrender his possession; that at the time the injunction was served on White he was in possession of his office, discharging his duties; that he did not take upon himself and discharge the duties of additional storekeeper, the position held by Butler; that he only received notice of his transfer from head storekeeper to additional storekeeper at 10.55 a. m., October 2nd, 1897, and that this information was contained in a letter from the collector, mailed from Parkersburg at 4 p. m. of October 1st. He further states that Sutton admitted to him on the 1st day of October that he had received no authority from the defendant to act as storekeeper, and that the authority reached him on the morning of October 2nd. Ruckman could not have acted as additional storekeeper, for the reason that his assignment was cancelled by wire October 2nd, the same day that he received notice that Sutton was to take his place. Sutton was to take Ruckman's place and Ruckman was to take Butler's, but Ruckman's place was never vacant, or if it was, he was directed by wire on the evening of October 2nd to remain in charge of the warehouse until further orders. It is apparent that Sutton never took possession of the warehouse, or if he did, he was superceded by the order directing Ruckman to remain in charge, which, by its terms, shows that he was to continue in his position and not to vacate it.

Butler testifies that he was in the actual service of the Government at the time the injunction was served on White, and that Ruckman did not take his position nor did he (Ruckman) perform the duties of additional storekeeper, for the reason that he had been served with the order of injunction and declined to perform the duties of the office held by affiant. The deputy marshal says that the process was served on Ruckman on the evening of the 1st of October. Faulkner proves that Berry handed a letter to Ruckman on the morning of the 2nd of October, authorizing Ruckman to act as additional storekeeper. Ruckman swears that at the time of the service of the injunction in this case upon Sutton (who admits that it was about 9 o'clock on the night of October 1st) he was performing and discharging the duties of head storekeeper at the distillery. The

affidavits of White and Sutton contradict the sworn statements of Butler, Ruckman, Faulkner, and the deputy marshal. The weight of evidence as to the notice seems to be and is with the plaintiffs. It is unfortunate that this conflict should have occurred. One thing is evident: That Butler has never surrendered his position and, so far as the defendant Ruckman is concerned (who does not claim it, but who insists upon his right to hold the position of head storekeeper), Butler holds his position adverse to Ruckman.

In the case of Berry, gauger, the same character of conflicting evidence exists as in the cases just passed upon. Berry denies that Thayer entered upon the duties of gauger on the 1st day of October, but swears that he was in possession of the property as gauger. Berry states that on October 2nd, 1897, Thayer came out to the distillery and, after asking him if he was the gauger in charge, showed him a telegram purporting to come from the Commissioner of Internal Revenue, assigning him as gauger at said distillery. This affidavit is supported by the affidavits of Faulkner and McMahan. It is contradicted by White and Thayer as to the time when Thayer took possession of the office and as to the time of the service of the injunction. The marshal testifies that they were served the evening of October the 1st with a copy of the injunction. Faulkner and McMahan sustain Berry as to what occurred on the morning of the 2nd day of October, from which it clearly appears that Thayer came that morning to take possession of the office. The only two disinterested witnesses to all of these occurrences, and particularly as to the time of the service of notice, are Faulkner and McMahan. Both of these witnesses sustain Ruckman, Butler, and Berry. The affidavits of both White and Thayer say they were at the distillery on October 1st, and that Berry was not there and could not therefore turn over the possession of any Government property in his charge to Thayer. But White says there was no Government property to turn over. The Commissioner required him to turn it over, but the collector says there was none to turn over. By reference to the "Regulations and Instructions Concerning the Tax on Distilled Spirits," under the Revised Statutes of the United States, and subsequent acts, issued February 19th, 1895 (pages 14 and 15), the act says: "That gaugers are made custodians of cistern rooms, and that under no circumstances will they entrust the key to the lock on the door of the receiving room to any person other than the collector of the district." A pertinent question arises: Did Berry turn the keys of the cistern room over to Thayer? It is not claimed that he did, but, on the contrary, Berry states that "on the 2nd day of October I was still in the possession of the property of the Government, as well as the keys, which, as such gauger, it is my duty to hold," which contradicts the statements of Thayer and White as to the possession of the office.

67 Another pertinent question is, What became of the gauger's outfit, consisting of box containing hydrometer cups, hydrometer, and stems, with which each gauger is supplied, which is the property of the Government? The law says: "Standard hydrometers are supplied for the use of internal-revenue gaugers, at the expense of the Government." (Regulations and Instructions Concerning Tax on Distilled Spirits, p. 123.) Did Berry have any distillery stamps and did he turn over any to Thayer? (Same, page 14.) I might refer to other things to show that

every gauger is in possession of property of the Government, and when he is removed must turn it over to his successor in office. No outfit was turned over to Thayer, which shows that possession was not surrendered by Berry to Collector White or Thayer. It is apparent that Collector White is at least under a great misapprehension as to what is the outfit of a gauger, when he says in his affidavit of October 19th, 1897, "that Berry had no property in his possession to turn over to the defendant Thayer to complete Thayer's assignment." He may entertain honestly that conviction, but I must hold that it is a mistaken conviction and does not accord with the statutes cited supra.

I reach the conclusion that the preponderance of evidence is with the plaintiffs, and that neither the gauger nor storekeepers have ever vacated or surrendered their offices or positions; that in contemplation of law they are in the legal custody of their offices and can only be displaced by proceedings instituted under the Executive order of July 27th, 1897; that the offices not having been surrendered and the injunction being served while plaintiffs were in possession, it was effective to prevent the interference of the defendants with the plaintiffs in the possession of their offices.

I deem it unnecessary to discuss the competency of the plaintiffs for their positions, though the evidence tends strongly to show that they were fully competent, having served in those positions since 1893.

One other position of the plaintiffs remains to be noticed, and that is that under the legislative and judicial act of 1885, reenacted in 1886, the collector is prohibited from recommending to the Secretary of the Treasury for appointment more officers of this class than fifteen per cent in excess of the number engaged in performing the duties at the time. It is very clear from the affidavit of Ruckman that the act has been violated, but it is not necessary to rest the case upon this position.

I think that both the law and the facts are with the plaintiffs, and the injunction heretofore awarded must be made perpetual.

(Endorsed:) Filed Nov. 8", 1897. L. B. Dellicker, clerk.

68 H. C. BERRY *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order perpetuating injunction.—Entered November 8, 1897.

H. C. BERRY *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

This cause came on to be further heard this 8th day of Nov., 1897, upon the bill, the demurrer to the bill, joinder in said demurrer, the answer by the defendant, general replication to said answer, and the affidavits filed therein, and upon the motion of the plaintiff to perpetuate the injunction heretofore awarded. Upon consideration whereof, the court is of the opinion to perpetuate the injunction and to make the same absolute, restraining and inhibiting the defendant White, the collector of this district, the appointing power, and the defendant Thayer and all

others from in any wise interfering with the plaintiff, H. C. Berry, in the possession of his office and in the discharge of his duty as *guager* at the Hannis distillery, located in the town of Martinsburgh, W. Va., until he shall be removed therefrom by proper proceedings had under the civil-service act and the rules and regulations made thereunder or by judicial proceedings at law; and the said collector having applied heretofore to the court for leave to the Commissioner to appoint temporarily a *guager* pending this litigation, he, the said collector, is required & directed to recommend and the Commissioner of Internal Revenue to transfer the temporary *guager* heretofore assigned and to permit the said *guager*, Berry, undisturbed to discharge the duties of his office as *guager* unless hereafter removed as hereinbefore provided.

And the counsel for the defendant having requested the court
69 to grant an appeal in this case, this order is suspended for the period of ten days to allow them to file their petition and assignment of error and give bond for the perfection of the appeal.

And the opinion filed by the judge of this court is ordered to be made a part of this record.

Enter.

JACKSON, *Judge.*

Nov. 8/97.

70 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Petition for appeal.—Filed Nov. 17, 1897.

In the circuit court of the United States for the district of West Virginia.

H. C. BERRY, PLAINTIFF, APPELLEE,
vs.
A. B. WHITE, COLLECTOR OF INTERNAL REVENUE for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin T. Thayer, defendants, appellants. } In equity.

The above-named defendants conceiving themselves to be aggrieved by the order entered on the 8th day of November, 1897, in the above-entitled cause, do hereby appeal from said order to the Supreme Court of the United States, and they pray that this their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

JOSEPH H. GAINES,
Attorney for the Defendants.

CHARLESTON, WEST VIRGINIA, *Nov. 16th, 1897.*

And now, to wit, on November 16th, 1897, it is ordered that the above appeal be allowed as prayed for.

J. J. JACKSON,
United States District Judge, District of West Virginia.

(Endorsed:) Filed Nov. 17, 1897. L. B. Dellicker, clerk.

71 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Assignment of errors.—Filed Nov. 17, 1897.

In the circuit court of the United States for the district of West Virginia.

H. C. BERRY, APPELLEE,
vs.
A. B. WHITE, COLLECTOR, ETC., ET AL., APPELLANTS. } In equity.

Assignment of errors.

And now, on the seventeenth day of November, in the year of our Lord one thousand eight hundred and ninety-seven, come the above-named appellants and file with their petition for allowance of appeal to the Supreme Court of the United States this their assignment of errors, and say that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit:

I.

That the allegations of plaintiff's bill do not show a proper case for the granting of an injunction.

II.

That the demurrer of defendants should have been sustained and the bill dismissed.

III.

That the act of Congress of the day of , 1883, known as the civil-service law, and the several Executive orders, rules, and regulations made in pursuance thereof, are unconstitutional and should have been so held. A court can not enjoin the removal from office of one holding an inferior appointive office nor in any manner control such removal.

72 IV.

A court can not enjoin an appointment to an inferior appointive office, or otherwise control such appointment.

V.

The power to appoint to and remove from the inferior appointive offices of the Government belongs exclusively to the Executive Department of the Government, and is not subject to any kind of intervention or control by the judiciary.

VI.

The civil-service law, if constitutional, does not give, even to these officers within its provisions, any right to resort to the courts to prevent

their removal, or to hold them in office after removal by the proper executive authority, having power to appoint and remove, pending the determination of a question, whether such removal was in contravention of the civil-service law.

VII.

Even if the civil-service law is constitutional and in any case has been violated, the remedy, if any, is executive and administrative, not judicial.

VIII.

That assignment to duty and the revocation of such assignment of storekeepers and *guag*ers are not affected by the civil-service law.

IX.

That the power to make such assignments and to revoke them instantly and at the will of the Commissioner of Internal Revenue is a power essential to the best interests, and even to the honest administration of the internal-revenue service.

X.

That revocation of assignment of storekeepers and *guag*ers is not a removal from office; and no attempt to remove the plaintiff from office has been made.

73

XI.

That the record shows that the Commissioner of Internal Revenue, who made the assignment and the revocation complained of, did not do so for political reasons, but for the good of the service, and the court should have so found and should have refused the injunction.

XII.

That the record shows that the revocation and assignment complained of were made, and the defendant, Franklin T. Thayer, substituted in place of plaintiff, before the service or other notice of the temporary order of injunction; and the court should have so held, and should have refused the injunction.

XIII.

That the honorable circuit court of the United States for the district of West Virginia, on whole record, should have refused the injunction and dismissed the defendants.

Wherefore the said defendants and appellants pray that the decree and order of injunction of the said circuit court of the United States for the district of West Virginia may be reversed and dismissed.

JOSEPH H. GAINES,
Attorney for Appellants.

CHARLESTON, WEST VIRGINIA.

(Indorsed:) Filed Nov. 17th, 1897. L. B. Dellicker, clerk.

74 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Appeal bond.—Filed Nov. 18, 1897.

Know all men by these presents, that we, A. B. White, of the city of Parkersburg, in the State of West Virginia, as principal, and L. M. La Follette and M. A. Kendall, as sureties, are held and firmly bound unto H. C. Berry in the full and just sum of five hundred dollars to be paid to the said H. C. Berry, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 18th day of November in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, lately at a circuit court of the United States for the district of West Virginia, sitting at Martinsburg in said district, in a suit depending in said court between H. C. Berry, plaintiff, and A. B. White, collector of internal revenue for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin T. Thayer, defendants, a decree was rendered against the said A. B. White, collector of internal revenue for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin T. Thayer, and the said A. B. White, collector of internal revenue for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin T. Thayer having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said H. C. Berry, citing, admonishing him to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the day in the said citation mentioned.

75 Now, the condition of the above obligation is such that if the said A. B. White, collector of internal revenue law for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin Thayer shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

A. B. WHITE. [SEAL.]
L. M. LA FOLLETTE. [SEAL.]
M. A. KENDALL. [SEAL.]

Sealed and delivered in presence of—
L. B. DELLICKER.
L. B. DELLICKER.
L. B. DELLICKER.

Approved by—

J. J. JACKSON,
U. S. Dist. Judge.

Nov. 18, '97.

(Endorsed:) Filed Nov. 22, 1897. L. B. Dellicker, clerk.

76 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Citation.—Filed Nov. 22, 1897.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to H. C. Berry, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the 18th day of December, eighteen hundred and ninety seven, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein A. B. White, collector of internal revenue for the district of West Virginia, A. L. Holt, John D. Sutton, Anthony Staubley, and Franklin T. Thayer are defendants and appellants and H. C. Berry is plaintiff and appellee, to show cause, if any there be, why the judgment of said circuit court of the United States in said appeal mentioned should not be corrected and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 18th day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

J. J. JACKSON,
U. S. District Judge.

77 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, &C. } Citation.

Service of the within writ acknowledged.

H. C. BERRY,
By FAWKENS & WALKER,
His Attorneys.

Nov. 22d, 1897.

Filed Nov. 22d, 1897. L. B. Dellicker, clerk.

78 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order for transcript of record and proceedings.

And thereupon it is ordered by the court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Supreme Court; and the same is transmitted accordingly.

Test:

L. B. DELLICKER, *Clerk.*

79 H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Clerk's certificate.

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do certify that the foregoing record is a true, full, and correct transcript of the record and proceedings had in the above-entitled cause, together with all things thereunto relating, as the same appear upon the files of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Martinsburg, at said district, this 11 day of December, A. D. 1897.

[SEAL.] L. B. DELLICKER, *Clerk.*

(Indorsement on cover:) Case No. 16752. West Virginia, C. C. U. S. Term No., 539. A. B. White, collector of internal revenue for the district of West Virginia, et al., appellants, vs. H. C. Berry. Filed December 18, 1897. Office Supreme Court of U. S. Received Dec. 18, 1897.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 540.

A. B. WHITE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WEST VIRGINIA, ET AL., APPELLANTS,

v.

WILLIAM BUTLER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

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1 UNITED STATES OF AMERICA,
District of West Virginia, to wit:

At a circuit court of the United States for the district of West Virginia, begun and held at the court-house in the city of Martinsburg on the 15th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable J. J. Jackson, district judge.

Among other were the following proceedings, to wit:

2 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Bill of complaint.—Filed September 29, 1897.

In the circuit court of the United States for the district of West Virginia, sitting at Wheeling, in said district.

J. G. RUCKMAN, H. C. BERRY, WILLIAM BUTLER, and J. W. League
vs.
A. B. WHITE, COLLECTOR OF INTERNAL REVENUE for the district of W. Va., A. L. Holt, John D. Sutton, and Anthony Staubley. } In equity.

To the honorable the judges of the said court, your orators J. G. Ruckman, H. C. Berry, William Butler, J. W. League, respectively show unto your honor:

First. J. G. Ruckman was duly appointed by the Secretary of the Treasury of the United States a United States storekeeper in 1893, and has been from that time until this such storekeeper of the United States at the Hannis distillery, at Martinsburgh, W. Va., and that H. C. Berry, one of your orators, was commissioned by the Secretary of the Treasury of the United States in July, 1893, as a United States *gauger* at the Hannis distillery in Martinsburgh, W. Va., and has remained in said position from that time until this; and that William Butler was commissioned by the Secretary of the United States Treasury a United States storekeeper in 1893 and assigned to duty as such at the Hannis distillery at Martinsburgh, W. Va., in 1893, where he has remained from that time until this as such United States storekeeper; that J. W. League
3 was commissioned by the Secretary of the Treasury of the United States a United States storekeeper in July, 1893, and assigned to duty at the Hannis distillery at Martinsburgh, W. Va., where he has remained from that time until this in said official position.

Second. Your orators would further show that they were appointed to their positions as aforesaid through the recommendation of E. M. Gilkeson, late collector of internal revenue for the district of W. Va., as provided by an act of Congress in such case made and provided.

Third. Your orators would further show that H. C. Berry is paid directly from the Treasury Department at Washington on an average of $100.00 per month for his services; that J. G. Ruckman, William Butler,

and J. W. League, United States storekeepers as aforesaid, are paid at the rate of $4.00 per day while on duty by the collector of internal revenue for the district of W. Va. as a disbursing agent of the Treasury Department, and that your orators are all officers of the United States Government, and as such have taken the oath of office and executed bonds as required by law, and that said oath of office and bond continues good and in force, regardless of the person'el/ of the collector of internal revenue for said district, and that they do not hold their positions at the discretion or upon the suff'rance of the collector of internal revenue.

Fourth. Your orators, further complaining, say that since their incumbency in said office they and each one of them have honestly, faithfully, and impartially discharged the duties imposed upon them; that they are especially well equipped and qualified to discharge all the duties of said positions.

Fifth. Your orators would further show that the defendant A. B. White was duly appointed United States collector of internal revenue for the district of W. Va., which appointment was duly con-
4 firmed by the Senate, and his commission has been duly issued and signed and he has qualified and taken charge of said office of collector as aforesaid, as provided by law.

Sixth. Your orators further show that A. B. White, collector of internal revenue as aforesaid, has declared his intention to appoint a gauger and three storekeepers to fill the place of your orators at the Hannis distillery, at Martinsburgh, W. Va., at an early date.

Seventh. Your orators would further show that they have been informed and believe that the defendants, A. L. Holt, John D. Sutton, and Anthony Staubley, all three residents of the district of W. Va., have been reinstated, or will be appointed and commissioned and assigned to duty in the place and in the stead of your said orators at the Hannis distillery, at Martinsburgh, W. Va., through the said A. B. White; that the said A. B. White, collector as aforesaid, has so declared his intention of reinstating the defendants in the place and stead of your orators, and that such intention on his part, your orators have been informed and believe, has been openly made by him, and the public press of the country has so announced. A copy of a clipping of the Daily World, of Martinsburgh, W. Va., of Sep. 7th, is herewith filed and asked to be read as a part hereof, and taken from the State Journal, edited and controlled by the said White.

Eighth. Your orators, further complaining, say that they are Democrats in politics, and were appointed as Democrats to said office, and that they vote the Democratic ticket; that the defendant A. B. White is a Republican and was as a Republican appointed to succeed E. M. Gilkeson, and that the said A. B. White has signified and declared his intention to remove from office or place in their stead the other three defendants as aforesaid because of the fact that your orators are in politics Democrats, and for no other reason, and appoint and recommend in their stead Republicans, for no other reason than that they are
5 Republicans in politics; and your orators are informed and believe that said appointees so proposed by said White are not eligible to the position.

Ninth. Your orators, further complaining, say that their offices as aforesaid are in the classified service and belong to what is known as

the "civil service," and as such your orators can not be removed except for cause shown and proven. That Department Circular No. 122 provides that "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department, or their appointing officers, and of which the accused shall have full notice and opportunity to make defence." Said Department circular is issued and signed by Hon. L. J. Gage, Sec. of the Treasury, and is filed herewith and ask' to be read as a part hereof. That in Department Circular No. 119, which is an Executive order, the same provisions are laid down together with others, and signed by the Acting Commissioner of Internal Revenue and approved by the Secretary of the Treasury, which said Executive order is herewith filed and asked to be read as a part of this bill. Your orators further show that they are employees of the Treasury Department; that they are included in the classified service, and protected from removal for political or religious reasons under the civil-service laws and rules of the United States, which will more fully appear by the following communication received from the Hon. Wm. G. Rice, acting president of the Civil Service Commission, of the date of Sep. 10, 1897, filed and asked to be read as a part hereof.

Tenth. Your orators, further complaining, say, that if said A. B. White be permitted to remove your orators from said offices and positions, or supplant them by others, that it will be illegal and in
6 violation of law. That rule second, section third, of the civil-service rules reads as follows: "No person in the executive civil service shall dismiss or cause to be dismissed or make any attempt to procure the dismissal of or in any manner change the official rank or position of any other person therein because of his political or religious affiliations." Which provisions your orators are informed and charge is being violated and attempting so to be violated by all of said defendants.

Section 1st of the civil-service rules: "Any person in the executive civil service of the United States who shall wilfully violate any of the provisions of the civil-service act or of these rules shall be dismissed from office."

Eleventh. Your orators further say that under the law they have a vested interest in said office, and that if the said A. B. White shall remove them therefrom, or assist in so doing, that it will be in violation not only of the civil-service rules, but of their vested interests in said offices, for which they can not have an adequate remedy at law, and must therefore appeal to a court of equity and ask its aid to enforce their rights, which have been guaranteed to them by act of Congress.

Twelfth. Your orators further show that they are able, competent, and willing to discharge the duties of said office, and are unwilling to be summarily dismissed therefrom for no other reason than that they are of opposite politics to the said A. B. White, collector of internal revenue, aforesaid.

Thirteenth. Your orators further show that said A. B. White, collector as aforesaid, has no power, right, or authority to remove your said orators from said office, or to appoint any other to take their place and thereby effect their removal, and that said defendants, A. L. Holt, John B. Sutton, and Anthony Staubley, have no right or authority to take the oath

of office and otherwise qualify and actually appear to take the
7 position, and thereby assist in the removal of your said orators,
and as there are no vacancies created either by removals or resignations, and there being 15% now commissioned, more than sufficient to perform the duties of storekeepers and *guag*ers in this district, and if they are permitted so to do, it will be in violation of law as well as in violation of the rights and vested interests of these complainants.

Fourteenth. Your orators further say that unless the said A. B. White be enjoined from removing your petitioners as they are informed and believe and so charge, he will so remove your complainants, and that unless A. L. Holt, John B. Sutton, and Anthony Staubley be enjoined from qualifying as officers of the United States to take the place of your orators at the Hannis distillery, in the district aforesaid, they will in this manner effect the removal of these complainants from their offices aforesaid, they having expressed their intention to accept said appointments and assignments.

Being therefore remediless save in your honorable court, the complainants therefore pray that an injunction be granted them restraining and prohibiting the said A. B. White, collector as aforesaid, and all others by and through him, from removing them from the positions of *guag*ers and storekeepers until vacancies are created according to law; as officers of the United States aforesaid and also from recommending, assigning, and appointing any person to the same position and from proceeding in the attempt to make such removal and *and* in any other manner interfering with your complainants.

Your orators further pray that said A. L. Holt, John D. Sutton, and Anthony Staubley may be enjoined, restrained, and prohibited from qualifying as *guag*ers or storekeepers to take the place of your complainants as such officers at the Hannis distillery in Martinsburgh, W.
8 Va., or in any other way aid or assist in the removal of your said orators, or performing or discharging any of the duties of said office, and that all further and general relief may be granted your orators as to equity may seem just and right; and they will ever pray, etc.

And to the end, therefor', that the said A. B. White, A. L. Holt, John D. Sutton, and Anthony Staubley may be made to make true and perfect answer to this bill.

Your orators further pray that process may be issued requiring the said defendants to appear on a day certain, and make full, true, and perfect answers to this bill, and that all other process, order, etc., may be had and entered, and they will ever pray, etc.

J. G. Ruckman.
H. C. Berry.
Wm. Butler.
J. W. League.

Faulkner & Walker,
Sol. for Plaintiffs.

United States of America,
District of W. Va., ss:

This day personally appeared before the undersigned authority, William Butler, whose name is signed to the foregoing bill, who being by me

first duly sworn, upon his oath states that he has read said bill and knows the contents thereof, and that the allegations therein contained are true except so far as they are therein stated to be upon information and belief, and so far as they are therein stated to be upon information and belief, he believes them to be true.

Taken, sworn to, and subscribed before me this 28th day of Sep., 1897.

[NOTARY'S SEAL.] GEO. W. JOHNSON,
Notary Public.

9 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

EXHIBIT WITH BILL.—From Daily World.

THE UNION VETERAN HANDSOMELY RECOGNISED—QUITE A NUMBER OF IMPORTANT CHANGES BEING MADE IN THIS REVENUE DISTRICT.

PARKERSBURG, *Sep. 10.*

Jospeh T. Van Metre, deputy collector, who has been in charge of the seventh division of this U. S. revenue collection district, resigned some days ago to take effect September first. His division is composed of the counties of Tucker, Mineral, Grant, Hardy, Pendleton, Hampshire, Morgan, Berkeley, and Jefferson counties. The vacancy will be filled by transferring J. H. Knapp, deputy collector, from the second division to that division.

The vacancy in the second division will be filled by the reinstatement in the service, as a Union veteran, of Capt. John W. Conner, of Philippi, who was an efficient deputy collector under Collectors Duval, Pierpoint, and McCormick and a *guager* under Collector White. This division is one of the largest in the State and is composed of the counties of Monongalia, Preston, Marion, Taylor, Harrison, Barbour, Lewis, Upshur, Randolph, Braxton, and Webster.

Deputy Collector A. H. Wiedebusch, of Wheeling, in charge of the first division, has resigned, and his resignation has been accepted to take effect on December first. His division is composed of the counties of Hancock, Brooke, Ohio, Marshall, and Wetzel.

The vacancy in the first division will be filled by the reinstatement in the service of Capt. W. Newt. Bonar, of Moundsville, a Union
10 veteran. Mr. Bonar was deputy under Collector White and had a fine record. He will be reinstated to his former division.

Capt. A. L. Hoult, of Fairmont, who has been reinstated as a Union veteran in the revenue service as a U. S. *guager*, will be assigned in a few weeks to duty at the Hannis Distillery at Martinsburg in place of *Guager* Berry.

Capt. John D. Sutton, of Sutton, has been reinstated as a U. S. storekeeper. He had a splendid record as a soldier and as an officer under Collector White. He will be assigned to duty as head storekeeper at Hannis Distillery in a short time.

Anthony Staubley, another Union veteran, of Martinsburg, has also been reinstated as U. S. storekeeper and will be assigned to duty at his home.

Other Union veterans who have been restored to the service and some of whom are assigned to duty in this State or elsewhere are General Bukey, transferred to the Treasury Department at Washington; Capt. C. B. Smith, deputy collector for the third division; Capt. Thayer, of Grafton, U. S. *guager*; J. V. Daniels, U. S. storekeeper, Harper's Ferry, and others.

A number of veterans are seeking reinstatement, among them Meredith Harman, of Martinsburg; John H. High, of Charleston; Capt. Turner, of Raleigh County; Capt. Maulsby, of Marion County, and others.

Collector White says there were seventeen Union soldiers in the service during his former term of office. He is getting as many of them back into the service as possible as vacancies occur.

11 EXHIBIT WITH BILL.

EXECUTIVE ORDER OF JULY 28, 1897, AS TO REMOVAL FROM OFFICE.

1897.
Department Circular No. 119.
Internal Revenue, No. 480.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., August 3, 1897.

The attention of collectors of internal revenue and other officers and agents is called to so much of Executive order of July 28, 1897, as is amendatory of Civil Service Rule II, which provides as follows:

"No removal shall be made from any position subject to competitive examination except for just cause, upon written *charges* filed with the head of the Department or other appointing officer, of which the accused shall have full notice and an opportunity to make defense."

In view of the foregoing, whenever any officer or employee in the internal-revenue service shall appear to the officer or agent charged with the supervision of his official conduct to be guilty of such dereliction of duty, delinquency, or misconduct, or shall prove inefficient to such an extent as to seem to justify the removal of such person from the service, it shall be the duty of such supervising officer to immediately forward to this office for submission to the Hon. Secretary of the Treasury written charges and specifications, detailing fully and explicitly the reasons for removal.

At the same time a complete copy of the charges and specifications will be furnished to the accused, with the information that such defense as is desired to be made in the premises must be submitted to the collector of the district, for transmission to this office, within ten days from date of receipt of the copy of the written charges.

12 Whenever it is impracticable to present a copy of the charges to the accused in person, it shall be sent by registered mail and the receipt carefully preserved.

The fact that the accused has thus been furnished with a complete copy of the charges and informed of the opportunity to make defense, as above set forth, will be reported to this office at the same time that the written charges are forwarded as aforesaid.

In the event that the accused fails to mail his written defense to the collector within the time above specified it will be assumed that such person does not desire to embrace the opportunity thus afforded.

The written defense will be forwarded to the collector by registered mail in all instances, and will be immediately transmitted to this office on receipt, accompanied by a letter of the collector, submitting his views in the matter of the defense and making such recommendation as the circumstances and the nature of the defense may seem to warrant.

When the circumstances are such as to render it evident that the interests of the service will be better subserved by immediately relieving the accused from duty, pending action on the charges, that course will be pursued, in which case the action taken will be promptly reported to this office.

In this connection attention is invited to the fact that under the terms of the statute (section 3163 A, Internal Revenue Compilation of 1894) the power of suspension of officers is vested in the Commissioner of Internal Revenue.

Collectors will furnish each officer and employee within their respective districts with a copy of this circular and enforce strict compliance with its provisions.

G. W. WILSON,
Acting Commissioner.

Approved:
L. J. GAGE,
Secretary of the Treasury.

13 UNITED STATES CIVIL SERVICE COMMISSION,
Washington, D. C., September 10, 1897.

Hon. CHARLES J. FAULKNER,
Martinsburg, West Va.

SIR: This Commission is in receipt of your communication of September 7, respecting appointments in the internal revenue district of West Virginia. You state that the collector holds that he can relieve the present officers from duty, although not removing them, and assign others, by way of re-instatement, to perform the duties of the offices.

In response you are informed that under Rule IX of the civil service rules a re-instatement may be made only where there is a "vacancy." (See the rules as printed in the appendix of the thirteenth report sent herewith.) A vacancy may not lawfully be created by the removal of an employee and the re-instatement of a person in his stead for political reasons. The creation of a vacancy for the sole purpose of appointing or re-instating a person to fill it because of political opinions is a violation of the law. A re-instatement may properly be made only where a vacancy arises in the natural course, and not by a forced removal without just cause. (See Rule II, clause 8, in the inclosed circular.) The arbitrary removal of an employee merely to make a place for another, even though a soldier, is a violation of law and a subversion of the merit system established by the civil service act and rules. (See also what is said in reference to removals at page 19 of the thirteenth report.) Rule II, clauses 3, 6, and 8, forbids changes in the service for political reasons or unjust cause, and clause 1 of the same rule makes a wilful violation of any of the rules cause for dismissal from office. The act of

14 March 3, 1885 (Stat. at L., vol. 23, p. 404), provides that there shall not be appointed or commissioned more deputy collectors,

storekeepers, storekeepers and *guagers*, *guagers*, inspectors, or other officers, or allowed to remain in commission at any one time, than 15 per centum in excess of the number actually engaged in performing duty at the time, and indispensably necessary for the performance of said duties.

Very respectfully,

WILLIAM G. RICE,
Acting President.

15 EXHIBIT.

PROVIDING FOR THE ENFORCEMENT OF THE PROVISIONS OF EXECUTIVE ORDER OF JULY 27, 1897, AS TO REMOVAL FROM THE CLASSIFIED SERVICE.

1897.
Department Circular No. 122.
Division of Appointments.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., August 11, 1897.

The attention of supervising officers and agents of this Department is called to so much of Executive order of July 27, 1897, as is amendatory of Civil Service Rule II, and provides as follows:

"No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department or other appointing officer and of which the accused shall have full notice and an opportunity to make defense."

In view of the foregoing, whenever any officer, agent, clerk, or employee in the service of this Department shall appear to the
16 officer or agent charged with the supervision of his official conduct to be guilty of such dereliction of duty, delinquency, or misconduct, or shall prove inefficient to such an extent as to seem to justify the removal of such person from the service, or his reduction in grade, it shall be the duty of such supervising officer to immediately forward to this office written charges and specifications, detailing fully and explicitly the reasons for removal or reduction.

At the same time a complete copy of the charges and specifications will be furnished to the accused, with the information that such defense as is desired to be made in the premises must be submitted to the supervising officer, for transmission to this office, within three days from date of receipt of the copy of the written charges.

Whenever it is impracticable to present a copy of the charges to the accused in person, it will be sent by registered mail and the receipt carefully preserved.

The fact that the accused has been furnished with a complete copy of the charges and informed of the opportunity to make defense, as above set forth, will be reported to this office at the same time that the written copy of the charges is forwarded to the accused, as aforesaid.

In the event that the accused fails to mail his written defense to the supervising officer within the time specified, it will be assumed that such person does not desire to embrace the opportunity thus afforded.

The written defense will be delivered in person when practicable, otherwise it should be forwarded to the supervising officer by registered

mail, and, after due examination, immediately transmitted to this office, accompanied by a letter of the supervising officer submitting his views
in the matter of the defense and making such recommendation
17 as the circumstances and the nature of the defense may seem to warrant.

When the circumstances are such as to render it evident that the interests of the service will be better subserved by immediately relieving the accused from duty, pending action on the charges, that course will be pursued, in which case the action taken will be promptly reported to this office.

Supervising officers will furnish each officer, agent, clerk, or employee within their respective jurisdictions with a copy of this circular and enforce strict compliance with its provisions.

L. J. GAGE, *Secretary.*

(Bill. Endorsed:) Filed in open court Oct. 1, 1897. L. B. Dellicker, clerk.

18 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order granting temporary injunction.—Entered Sept. 29th, 1897.

WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL., FOR the district of West Virginia. } In equity.

This cause came on to be heard this 29th day of September, 1897, upon the complaint of William Butler in the above-entitled cause, who presented to the court his bill, praying, among other things, that an injunction be granted, restraining and inhibiting the defendant A. B. White, U. S. collector of internal revenue for the district of West Virginia, from recommending the appointment of A. L. Hoult, and any other person, by or through him, from removing him, the said Butler, from the position of *guager* at the Hannis distillery, in said district of West Virginia, until a vacancy is created according to law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal and from in any manner interfering with the complainant, William Butler, in his said office.

And further, that A. L. Hoult and any other person be restrained and enjoined from qualifying as *guager* to take the place and position of the said William Butler at the said distillery, in said district, or in discharging any of the duties of said officer, Butler; and the bill having been inspected and seen by the court, it is ordered filed.

And thereupon the complainant, Butler, moved for a temporary restraining order, pending said application and motion for an injunction, in
19 accordance with the prayers of his bill, upon consideration whereof the court is of opinion to and doth allow said temporary restraining order.

Whereupon it is adjudged, ordered, and decreed that A. B. White, U. S. collector of internal revenue for the district of West Virginia,

be, and is hereby, restrained, enjoined, and inhibited from recommending the appointment of A. L. Hoult, or any other person, and from removing the said complainant, Butler, as *gua*ger aforesaid, until a vacancy therein is created according to law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfering with said complainant, Butler, in his said office, as aforesaid.

It is further adjudged, ordered, and decreed that A. L. Hoult and all others be, and they are hereby, enjoined and prohibited from acting as *gua*ger in the place and stead of the said complainant, Butler, as aforesaid, or in discharging any of the duties of said office, until the further order of this court.

And it is further ordered by the court that a service of a copy of this order shall be sufficient service of the notice for the application and motion for said injunction, and the application for an injunction is set down for a hearing before the court sitting at Clarksburg on Wednesday, the 6th day of October, 1897.

(Endorsed:) Enter. Jackson, judge. Sept. 29, '97.

20 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Process and return of service.—Returned Sept. 29th, 1897.

WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL., FOR THE district of West Virginia. } In equity.

This cause came on to be heard this 29th day of September, 1897, upon the complaint of William Butler in the above-entitled cause, who presented to the court his bill, praying, among other things, that an injunction be granted, restraining and inhibiting the defendant A. B. White, U. S. collector of internal revenue for the district of West Virginia, from recommending the appointment of A. L. Hoult, and any other person, by or through him, from removing him, the said Butler, from the position of *gua*ger at the Hannis distillery, in said district of West Virginia, until a vacancy is created according to law, and from assigning and appointing any person to the same position and from proceeding in the attempt to make such removal and from in any manner interfering with the complainant, William Butler, in his said office.

And further, that A. L. Hoult and any other person be restrained and enjoined from qualifying as *gua*ger to take the place and position of the said Butler at the said distillery, in said district, or in discharging any of the duties of said officer, Butler; and the bill having been inspected and seen by the court it is ordered filed.

And thereupon the complainant, Butler, moved for a temporary restraining order, pending said application and motion for an injunction, in
21 accordance with the prayers of this bill, upon consideration whereof the court is of the opinion to and doth allow said temporary restraining order.

Whereupon it is adjudged, ordered, and decreed that A. B. White, U. S. collector of internal revenue for the district of West Virginia, be, and he is hereby, restrained, enjoined, and inhibited from recommending the appointment of A. L. Hoult, or any other person, and from removing the said complainant, Butler, as *guager*, aforesaid, until a vacancy therein is created according to law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfering with said complainant, Butler, in his said office, as aforesaid.

It is further adjudged, ordered, and decreed that A. L. Hoult, and all others be, and they are hereby, enjoined and prohibited from acting as *guager* in the place and stead of the said complainant, Butler, as aforesaid, or in discharging any of the duties of said office, until the further order of this court.

And it is further ordered by the court that a service of a copy of this order shall be sufficient service of the notice for the application and motion for said injunction, and the application for an injunction is set down for a hearing before the court sitting at Clarksburg on Wednesday, the 6th of October, 1897.

I, L. B. Dellicker, clerk of the circuit court of the United States, do certify that the foregoing is a true copy of an order duly made, entered of record in said court at Wheeling this 29th day of September, 1897.

In testimony whereof I hereunto set my hand and the seal of said court at Wheeling this 29th day of September, 1897.

[SEAL.] L. B. DELLICKER, *Clerk*.

(Endorsed:) Executed this writ September 29th, 1897, by leaving with Mrs. A. B. White, wife of the within-named defendant, A. B. White, at his residence in the city of Parkersburg, W. Va., a duly certified
22 copy thereof, the said A. B. White being then absent therefrom. J. K. Thompson, U. S. marshal, D. W. Va. By Wilton Randolph, deputy.

23 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order granting temporary injunction.—Entered September 29, 1897.

WILLIAM BUTLER
vs.
A. B. , COLLECTOR, ET AL., FOR THE district of West Virginia. } In equity.

This cause came on this 29th day of Sept., 1897, upon the complaint of Wm. Butler in the above-entitled cause, who presented to the court his bill, praying, among other things, that an injunction be granted restraining and inhibiting the defendant, A. B. White, U. S. collector of internal revenue for the district of West Virginia, from recommending the appointment of A. L. Hoult, John D. Sutton, and Anthony Staubley, or any other person by or through him or them, from removing him from the position of storekeeper at the Hannis distillery, in the

district of West Virginia, until vacancies are created according to law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal and in any manner interfere with the complainant, Wm. Butler, in his said office.

And, further, that A. L. Hoult, John D. Sutton, Anthony Staubley, and all other persons be restrained and enjoined from qualifying as storekeeper to take the place and position of the said Wm. Butler, at the said distillery in the said district, or in discharging any of the duties of said officer, Butler; and the bill having been inspected and seen by the court, it is ordered to be filed.

24 And thereupon the complainant, Butler, moved for a temporary restraining order, pending said application and motion for an injunction, in accordance with the prayers of this bill, upon consideration whereof the court is of the opinion to and doth allow said temporary order.

Whereupon it is adjudged, ordered, and decreed that A. B. White, U. S. collector of internal revenue for the district of West Virginia, be, and is hereby, restrained, enjoined, and inhibited from recommending, appointing, or aiding in the appointment of A. L. Hoult, John D. Sutton, Anthony Stroubly, or any other person, to said position, and from removing the said complainant, Butler, as aforesaid, until a vacancy therein is created by law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfere with said complainant, Butler, in the said office, as aforesaid.

It is further adjudged, ordered, and decreed that A. L. Hoult, John D. Sutton, Anthony Staubley, and all other persons be, and they are hereby, enjoined and prohibited from acting as storekeeper in the place and stead of the said complainant, Butler, as aforesaid, or in discharging any of the duties of said officer, until the further order of this court.

And it is further ordered by the court that a service of a copy of this order shall be sufficient service of the notice of the application for an injunction, which is set down for a hearing before the court, sitting at Clarksburg, on Wednesday, the 6th of October, 1897, and J. C. McMahon is hereby designated to serve this injunction.

Enter.

JACKSON, *Judge*.

Sep. 29, '97.

25 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL., FOR the district of West Virginia. } In equity.

Process and return.

This cause came on this 29th day of September, 1897, upon the complaint of William Butler, in the above-entitled cause, who presented to the court his bill, praying, among other things, that an injunction be granted restraining and inhibiting the defendant, A. B. White, U. S. collector of internal revenue for the district of West Virginia, from recommending the appointment of A. L. Hoult, Jno. D. Sutton, Anthony Stroubley,

or any other person by or through him or them, from removing him from the position of storekeeper at the Hannis distillery, in the district of West Virginia, until vacancies are created according to law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any way interfere with the complainant, William Butler, in his said office.

And, further, that A. L. Hoult, John D. Sutton, Anthony Staubly, and all other persons be restrained and enjoined from qualifying as storekeeper to take the place and position of the said William Butler at the said distillery, in the said district, or in discharging any of the duties of said officer, Butler; and the bill having been inspected and seen by the court, it is ordered to be filed.

And thereupon the complainant, Butler, moved for a temporary restraining order pending said application and motion for an injunction, in accordance with the prayers of his bill, upon consideration whereof the court is of opinion to and doth allow said temporary order.

Whereupon it is adjudged, ordered, and decreed that A. B. White, U. S. collector of internal revenue for the district of West Virginia, be,
26 and is hereby, restrained, enjoined, and inhibited from recommending, appointing, or aiding in the appointment of A. L. Hoult, John D. Sutton, Anthony Stroubley, or any other person, to said position, and from removing the said complainant, Butler, aforesaid, until a vacancy therein is created by law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfere with the said complainant, Butler, in the said office as aforesaid..

It is further adjudged, ordered, and decreed that A. L. Hoult, John D. Sutton, Anthony Stroubley, and all other persons be, and they are hereby, enjoined and prohibited from acting as storekeeper in *in* the place and stead of the said complainant, Butler, as aforesaid, or in discharging any of the duties of said office, until the further order of this court.

And it is further ordered by the court that a service of a copy of this order shall be sufficient service of the notice of the application for an injunction, which is set down for a hearing before the court, sitting at Clarksburg on Wednesday, the 6th of October, 1897; and J. C. McMahon is hereby designated to serve this injunction.

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do hereby certify that the foregoing is a true copy of an order entered of record in the cause of William Butler vs. A. B. White, collector, et al., on the 29th day of September, 1897.

In testimony whereof I have hereunto set my hand and the seal of said court this 1st day of October, 1897.

L. B. Dellicker, *Clerk.*

(Endorsed:) Served the within-named order on the within-named John D. Sutton, by delivering to him, in person, an office copy thereof
27 on the 5th day of Oct., 1897, and on A. B. White, by delivering to him, in person, an office copy hereof on the 6th day of Oct., 1897.

J. C. McMahon.

(Endorsed:) Filed Oct. 19", 1897. L. B. Dellicker, clerk.

28 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Answer of defendants.—Filed October 8, 1897.

In the circuit court of the United States for the district of West Virginia

WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR OF INTERNAL REVENUE FOR the district of West Virginia, A. L. Hoult, John D. Sutton, and Anthony Staubley. } In equity.

The answer of the above-named defendants, White, Sutton, and Staubley, to the bill of complaint of the above-named plaintiff.

For answer to said bill the defendants say as follows:

1. They are advised, and believe that it is true, that the plaintiff was commissioned by the Secretary of the Treasury of the United States a storekeeper in 1893; but they say that it is not true that he has been assigned to duty at the Hannis distillery at Martinsburg, West Virginia, all the time since his appointment. That it is, and has been for a long time, the policy of the Internal Revenue Bureau to rotate the assignments of storekeepers and *guag*ers for the purpose of securing to each of such *guag*ers and storekeepers a fair proportion of employment, and for the purpose of preventing collusion between the *guag*ers and storekeepers and distillery officials, and otherwise protecting the interests of the Government. And under the policy aforesaid the plaintiff
29 has been repeatedly assigned to and relieved from assignment to duty at said Hannis distillery. That he was on duty at said Hannis distillery during the months of July, August, and September, 1897, and the time arrived at the end of September, 1897, when it was deemed by the Commissioner of Internal Revenue fair and right among the several storekeepers, and for the best interests of the public service, to relieve plaintiff from duty at said distillery. And thereupon an order was made by the Commissioner of Internal Revenue, on September 30, 1897, relieving said Butler from duty as storekeeper at said Hannis distillery, which said order was, on the same day, telegraphed to said Butler. And on the said 30th of September an order was made by the Commissioner of Internal Revenue assigning J. G. Ruckman to duty at said distillery in place of plaintiff, which said order was, on the same day mailed to said Ruckman. And the defendant A. B. White, collector of internal revenue for the district of West Virginia, on the 1st day of October, 1897, by authority and direction of the Commissioner of Internal Revenue, notified said Ruckman of his assignment to duty in the place of plaintiff. And at the time of said notification of said Ruckman the said A. B. White, collector of internal revenue for the district of West Virginia, found said Ruckman in the storeroom of said distillery performing the duties from which said plaintiff had been relieved. That the said Ruckman was appointed a storekeeper about the year 1893, and that he was on duty at said distillery as storekeeper during the month of September, 1897, as "head" or "day" storekeeper;

and that the order of the Commissioner of Internal Revenue in relation to him, hereinbefore referred to, simply had the effect of relieving him as "day" storekeeper and assigning him to duty as "additional" storekeeper, in the place of said Butler, relieved, and at the same rate of compensation.

2. Defendants are not advised, and therefore neither admit nor deny, that the plaintiff was appointed upon the recommendation of the late collector, E. M. Gilkeson.

30 3. The defendants admit that the plaintiff is an officer of the United States, duly appointed and commissioned, and has, so far as defendants know, executed the bond as required by law; and that the compensation of a storekeeper of his class is $4.00 per day for such time as he shall be officially employed according to law. And the defendants further admit that the plaintiff does not hold his position "at the discretion or upon the suff'rance of the collector of internal revenue." And the defendants say that the collector of internal revenue has not attempted to exercise any such authority.

4. The defendant White, collector, &c., denies that the plaintiff is "well equipped and qualified to discharge all the duties of storekeeper," but, on the contrary, says that he is informed and believes that the plaintiff is incompetent. And the defendants say that the Commissioner of Internal Revenue has been informed by the late collector, E. M. Gilkeson, that the plaintiff was incompetent, as will more fully appear from a certified copy of the official correspondence between said Gilkeson and the Commissioner and Acting Commissioner of Internal Revenue, herewith filed as part hereof, marked as "Exhibit No. 1," and asked to be read as part hereof.

5. The defendants admit that the said A. B. White has been duly appointed and commissioned collector of internal revenue and has qualified and taken charge of said office.

6. The defendants say that the defendant A. B. White, as collector of internal revenue, has never declared his intention to appoint the plaintiff or any one else a storekeeper or *guager*, knowing full well and recognising the fact that storekeepers and *guagers* are and can be appointed by the Secretary of the Treasury only.

7. The defendants say that the defendant Hoult was reinstated

31 by the Secretary of the Treasury July 9th, 1897, as a *guager*, in accordance with the laws of the United States and in accordance with the civil-service law, having first been certified as eligible to such reinstatement by the Civil Service Commission. And that the said John D. Sutton was also reinstated August 16th, 1897, by the Secretary of the Treasury, as a storekeeper, in accordance with the civil-service law, having first been certified as eligible by the Civil Service Commission. And that the defendant Anthony Staubley was, on the day of August, 1897, reinstated as a storekeeper by the Secretary of the Treasury, in accordance with the civil-service law, having been first certified as eligible to such reinstatement by the Civil Service Commission. That the said Hoult, Sutton, and Staubley had all been duly commissioned, and executed bonds and qualified prior to the institution of this suit. The defendant White denies that he has ever declared his intention to reinstate any of said officers or assign them to duty in the place of the plaintiff, recognising fully that he had no such authority. And defendants

further say that neither the defendant Hoult nor the defendant Staubley has been assigned to duty since his reinstatement.

8. The defendant White further says that he admits that he is a Republican in politics, and he further says that he knows nothing about the politics of said Butler, except what he has heard and what the said Butler has said to him, and that, in a conversation with said Butler before the institution of this suit, said Butler gave the said White to understand that he had voted for the Republican candidate for President of the United States at the last Presidential election, and that he had procured prominent Republicans to write the same to him, and to ask favors for said Butler for that reason. The defendant White denies that he ever signified or declared his intention to remove plaintiff from office or place the defendants or anyone else in his place for the reason that the plaintiff was a Democrat in politics, and for no other reason to appoint or recommend in his stead a Republican.

The defendant White says that in fact and in law he could
32 have nothing to do with the removal or appointment of a storekeeper or gauger unless it be to recommend the same; that, in short, the appointment of storekeepers and gaugers and their removals can be made only by the Secretary of the Treasury. The defendants furthermore say that the assignment complained of by the plaintiff was made by the Commissioner of Internal Revenue, whom the defendants understand is a Democrat.

9. The defendants admit that the office of storekeeper held by the plaintiff is in the classified service, "and belongs to what is known as the civil service." And the defendants expressly charge that, so far as they know, the plaintiff has not been removed, but, on the contrary, still holds the position of United States storekeeper. The defendants insist that the fact that he has been relieved from assignment to duty at the distillery of the Hannis distillery at Martinsburg does not remove him from office; that he may be assigned to duty at any time by the Commissioner of Internal Revenue. The defendants further insist that the plaintiff can not in this manner question the right of the Commissioner of Internal Revenue to assign a United States storekeeper at a distillery or relieve one who has already been assigned. The defendants further insist that the Commissioner of Internal Revenue alone has the right to assign to duty a United States storekeeper and to determine how long he shall remain on duty under such assignment; and that no law, Executive order, or rule or regulation of the Civil Service Commission is violated by the Commissioner of Internal Revenue doing as he has done in this case in exercising the authority conferred upon him by the acts of Congress by assigning him to duty at the distillery and relieving from duty the plaintiff, who had been theretofore assigned to duty at the same distillery by the same Commissioner and by the same acts of Congress. And defendants further say that no act of Congress, Executive order, or rule or regulation of the Civil Service Commission is violated by the collector of internal revenue who, in accordance with the rules
33 and regulations of the Internal Revenue Bureau, recommends for assignment a storekeeper duly appointed by the Secretary of the Treasury, and who has executed bond and qualified as such.

10. The defendants deny that there is any attempt on the part of the said White to remove the plaintiff from office; that, as hereinbefore stated, he claims no such right or power.

11. The defendants, further answering, say that the defendants are not attempting by themselves or to assist anyone else to violate any law or civil service rule or regulation.

12. The defendants, further answering, say that no doubt the plaintiff is willing to continue in office, but the defendant White charges, as hereinbefore stated, that the plaintiff is incompetent, and that if any attempt is or shall be made to remove and dismiss the plaintiff from the service it has not been and will not be made "for no other reason than that" he is "of opposite politics to the said A. B. White, collector of internal revenue."

13. Replying to allegation No. 13 in plaintiff's bill, the defendants again say that the defendant White claims no right or authority to remove the said plaintiff from office or to appoint anyone in his place, and that he never has claimed any such power. The defendants say that the defendants Hoult, Sutton, and Staubley, having been duly appointed to the positions respectively held by each of them by the Secretary of the Treasury, that the right to hold said positions can not be questioned in this or any other collateral proceedings; that the question whether there were or were not vacancies at the time these appointments were made can not be determined in this suit. Neither of said defendants Hoult, Sutton, or Staubley was appointed in place of the plaintiff. The appointment of neither will affect the plaintiff, and whether the Secretary of the Treasury has more of these officers in commission than he is entitled to have under the law is not a question which can be raised by the plaintiff in this suit. It can not be ascertained in this proceeding whether or not 15% or any other
34 number of officers are now in commission more than are sufficient to perform the duties of storekeepers and *guag*ers in this collection district. This court, it is respectfully suggested, will not undertake to ascertain the number of distilleries in operation and to be placed in operation in said collection district and the number of storekeepers and *guag*ers to be placed on duty at such distilleries. It is submitted that these are questions to be determined by the Treasury Department, and must be supposed to have been determined before such appointments were made, and the appointments made in conformity to the interests and requirements of the public service. Defendants therefore deny that by the appointment of the defendant Hoult, Sutton, and Staubley more storekeepers were placed in commission than were sufficient to perform the duties of such officers in said district.

14. The defendants deny that the appointment and qualification of the said Hoult, Sutton, and Staubley will make necessary the removal of the plaintiff.

The defendants, further answering, say that the defendant Hoult was, on the day of , 1889, appointed a U. S. *guag*er; that on the day of , 1893, after having served about four years, and there having been a change of Administration, he was removed from said position through no delinquency or misconduct of his; that

during the late war of the rebellion he served in the military service of the United States, and was honorably discharged therefrom; that, availing himself of the provisions of Rule IX of the civil service regulations, he made application to the Secretary of the Treasury to be reinstated to the position from which he had been removed; that defendants are informed that said petition, together with the requisition of the proper officer of the Treasury Department, were referred to the Civil Service Commission, and his eligibility having been properly certified by said Commission, he was reinstated by the Secretary of the Treasury.

35 Said petition was originally filed with E. M. Gilkeson, late collector of internal revenue, and, together with the recommendation of said collector, forwarded to the Commissioner of Internal Revenue. The defendants insist that in making said appointment or reinstatement the Secretary of the Treasury acted in strict conformity with the acts of Congress and the rules and regulations of the Civil Service Commission. The defendants Sutton and Staubley were similarly reinstated and reappointed as storekeepers.

The defendant A. B. White further says that the recommendation made by him to the Commissioner of Internal Revenue relative to the plaintiff was made prior to the 29th day of September, 1897, and that the said recommendation was made in part because the said plaintiff had been on duty for some time, and mainly for the reason that said White was informed and believed said plaintiff to be incompetent. Said defendants further say that they believe and charge that the reinstatement and appointment of said defendants Hoult, Sutton, and Staubley were not made by the Secretary of the Treasury for political reasons, nor was the plaintiff relieved from assignment at the Hannis distillery by the Commissioner of Internal Revenue for political reasons, or the said Ruckman assigned to duty at said distillery, as hereinbefore stated, for political reasons.

And having fully answered, defendants ask to be hence dismissed with their costs. And, as in duty bound, they will ever pray, &c.

A. B. WHITE,
Collector of Internal Revenue, District of West Virginia.
JOHN D. SUTTON,
ANTHONY STAUBLY,
Defendants.

JOHN W. MASON,
JOSEPH H. GAINES, *U. S. Atty.*
For Defendants.

36 STATE OF WEST VIRGINIA,
County of Harrison, to wit:

A. B. White, one of the defendants named in the foregoing answer, being first duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information, and so far as they are therein stated to be upon information he believes them to be true.

A. B. WHITE.

Taken, subscribed, and sworn to before me this 8 day of October, 1897.

L. B. DELLICKER, *Clerk.*

STATE OF WEST VIRGINIA,
County of Berkeley, to wit:

John D. Sutton, one of the defendants named in the foregoing answer, being first duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information, and so far as they are therein stated to be upon information he believes them to be true.

JOHN D. SUTTON.

Taken, subscribed, and sworn to before me this 19th day of October, 1897.

U. S. G. PITZER,
Notary Public.

(Endorsed:) Circuit court U. S., dist. W. Va. Filed in office this 8th day of October, 1897. L. B. Dellicker, clerk.

37 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

EXHIBIT NO. I.—With defendants' answer.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INT. REV.,
Washington, D. C., May 22, 1897.

E. M. GILKESON, Esq.,
Collector Internal Revenue, Parkersburg, West Virginia.

SIR: This office is in receipt of a letter from Storekeeper Wm. Butler, of your district, under date of the 19th instant, enclosing one from you addressed to him under date of the 28th ultimo, in which you inform him that "according to the plan of rotation heretofore used with the force at this distillery (the Hannis Distilling Co.), you (he) would be reassigned June 1st," but that you "have decided, however, not to make any more changes after those for the first of May during my (your) incumbency as collector unless that should be extended longer than I (you) now anticipate."

You are informed that upon an examination of the records it appears that operations were suspended at the Hannis Distilling Co. on December 19, 1896, and that since that date Storekeeper Butler has been off duty during the month of February and will have been off duty during the present month; also that Storekeeper League has been off duty during a portion of the month of December, 1896, and during the entire months of January and April, 1897, whereas it appears that Storekeeper
38 Ruckman has been off duty during the month of March only.

It is the intention of this office that, all things being equal, each officer shall receive his due proportion of assignment to duty, and to that end you are hereby directed to recommend the assignment of Storekeeper Butler to duty, to take effect the first proximo, unless there are good and sufficient reasons known to you why such assignment should not be made, in which case you will make full report of the facts to this office.

Respectfully, yours,

(Signed) G. W. WILSON,
Acting Commissioner.

39 INTERNAL REVENUE SERVICE,
DISTRICT OF WEST VIRGINIA,
COLLECTOR'S OFFICE,
Parkersburg, W. Va., May 24, 1897.

Hon. W. S. FORMAN,
Commissioner of Internal Revenue, Washington, D. C.

SIR: Replying to the letter of the Hon. Acting Commissioner of the 22nd instant (T. A. C., S. L. S., T. E. K.) in regard to the letter dated 19th instant, from Storekeeper Wm. Butler, of this district, addressed to you, wherein he complains of my decision not to recommend him for reassignment to the warehouse of the Hannis Distilling Company the first proximo, I have the honor to report as follows:

You call attention to the fact that your records show that since December 19, 1896, the date of the last suspension at the Hannis Distilling Company, Storekeeper Butler has been off duty during the month of February and the present month; that Storekeeper League has been off duty during a portion of December, 1896, and the months of January and April, 1897, while Storekeeper Ruckman has been off duty during the month of March only.

If you will examine the records of your office during all the suspensions at this distillery since I became collector of internal revenue for this district, you will find that, in so far as the dates of suspension and resumption would permit, the time lost by officers at this distillery has been fairly apportioned among them. But for the circumstances which controlled my decision in this matter Storekeeper Ruckman would have been retired the first proximo and Storekeeper Butler reassigned. In addition to my official letter to Storekeeper Butler of the 28th ultimo announcing my decision in the matter, I wrote him a frank per-
40 sonal letter fully explaining my reasons therefor.

You will notice from your records that Mr. Ruckman and Mr. League have both been assigned to duty as day storekeepers, while Mr. Butler has never had an assignment other than additional storekeeper. His duties have not been above the rank of a guard or watchman. He is not competent to fill the position of storekeeper in charge. My four-year term of office expires June 30th, 1897, at which time I expect this office to be transferred to my successor, when appointed. As only two officers can be on duty at the Hannis Distillery during suspension, I naturally desired that these two should be the best, so that in case of the sickness or unavoidable absence of either the other could immediately take charge of the records, etc., etc. I am particularly anxious that Mr. Ruckman should be on duty when transfer of office is to be made, because he is unquestionably the best officer of the three. My successor must, as you know, receipt for all the spirits in bond. It is therefore important for me and for him to know that I have taken every precaution to secure correct records at that distillery, the only one of considerable size in the district.

My action in the matter is not intended to prejudice Mr. Butler with my successor. If he should be retained his due proportion can easily be arranged after July 1st, as the distillery will not resume before September, if then.

I trust my course in the matter will meet with your approval. I should regret very much to be forced to change my decision now as I

cannot but believe that under the circumstances it would severely interfere with the proper discipline of the force at that distillery, and might be a source of much embarrassment at a time when I am particularly anxious that everything in the district should be in the best possible condition.

Respectfully, yours,

(Signed) E. M. GILKESON,
Collector.

41 [Internal Revenue Service, District of West Virginia, Collector's Office, Parkersburg, W. Va.]

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., May 26, 1897.

E. M. GILKESON, Esq.,
Collector Internal Revenue, Parkersburg, West Virginia:

SIR: Your letter of the 24th instant has been received relative to the assignment to duty at the distillery of the Hannis Distilling Co., of your district, of Storekeeper Wm. Butler, for day service, vice J. G. Ruckman. You state therein that Storekeeper Butler has never been assigned for day service to this distillery; that his duties have not been above the rank of a guard or watchman, and that he is not competent to fill the duties of storekeeper-in-charge.

In answer, you are informed that the records of this office show that during the month of August, 1895, Mr. Butler was assigned to the Hannis Distilling Co. in the capacity of day storekeeper, and that the daily returns Form 86 and monthly return form 87 received from him were satisfactory in every respect, and none were required to be returned for correction or for explanation; in fact, they compare favorably with the reports received from the majority of the officers of this class.

The office is therefore still of the opinion that this officer should receive his due proportion of service, and to that end has this day assigned him to duty for day service at the Hannis Distilling Co., to take
42 effect the first proximo, vice Storekeeper J. G. Ruckman.

Respectfully, yours,

(Signed) G. W. WILSON,
Acting Commissioner.

43 INTERNAL REVENUE SERVICE,
DISTRICT OF WEST VIRGINIA;
COLLECTOR'S OFFICE,
Parkersburg, W. Va., May 28, 1897.

Hon. W. S. FORMAN,
Commissioner of Internal Revenue, Washington, D. C.

SIR: Replying to the letter of the Hon. Acting Commissioner of the 26th instant (T. A. C., S. L. S., T. E. K.), relative to the assignment to duty at the distillery of the Hannis Distilling Company, of this district, of Storekeeper Wm. Butler for day service vice J. G. Ruckman, I beg to say that while I was in error in my letter of the 24th instant in saying that Mr. Butler had never been assigned to duty as day storekeeper, I was not in error in stating that his duties performed had never been above the grade of a guard or watchman, and that he was not competent to discharge the duties of day storekeeper.

In making the statement that Mr. Butler had never been assigned as day storekeeper I was speaking from memory and overlooked at the time that he had been so assigned in August, 1896. Mr. Butler has not since requested to be assigned as day storekeeper, and only requests now to be assigned as additional storekeeper.

You refer to the reports on Forms 86 and 87 for the month of August, 1895, and say that they compare favorably with the reports received from the majority of the officers of this class. There were twelve withdrawals at the Hannis Distilling Company reported on Form 86 for August, 1895. According to the records of this office, Form 86 for August 1, 1895, was prepared and signed by Storekeeper J. W. League. This was probably due to the fact that his revocation as day storekeeper was delayed and had not reached him on that date. On August 12th, 13th, and
44 15th, Forms 86 were prepared by Storekeeper League, who was at the distillery, but not assigned. On August 10th, 19th, 21st, 22nd, 24th, 26th, 28th, and 31st, Forms 86 were prepared by J. G. Ruckman, who was assigned to duty for that month as additional storekeeper. Form 87, for August, 1895, was made out by Storekeeper Ruckman. These statements can readily be verified by comparing the returns for August, 1895, with the reports for other months rendered by Storekeeper' Ruckman and League. I have, however, taken the precaution to ascertain beyond a doubt that the reports for that month were, at the personal request of Storekeeper Butler, made out as above indicated. Mr. Butler was day storekeeper in name only. He proved at that time the truth of my statement that he is not competent to fill the position.

Mr. Butler with the assistance of Storekeeper League could nominally fill the position of day storekeeper, but should Mr. League become sick, or for any personal reason refuse the assistance, there would be immediate confusion. I can not think that such an unsatisfactory arrangement would meet your approval, and for that reason I respectfully submit the above and await your further instructions.

Very respectfully,

(Signed) E. M. GILKESON,
Collector.

45 [Telegram.]

WASHINGTON, D. C., *May 29, 1897.*

To Collector GILKESON:

Storekeeper Ruckman may be continued on duty at Hannis distillery, with understanding that Butler will be assigned thereto on July first.

(Signed) G. W. WILSON,
Acting Commissioner.

PARKERSBURG, W. VA., *October 6th, 1897.*

I hereby certify that the above and foregoing correspondence is a correct copy of the originals on file in the office of the collector of int. rev. for the dist. W. Va.

J. B. FINLEY, *D. C.*

(Endorsed:) Circuit court U. S., dist. W. Va. Filed in office this 8th day of October, 1897. L. B. Dellicker, clerk.

46 In the circuit court of the United States for the district of West Virginia.

WM. BUTLER, PLAINTIFF,
vs.
A. B. WHITE, COLLECTOR, ET AL., DEFENDANTS. } In equity.

Replication to answer.—Filed Oct. 19, 1897.

WM. BUTLER, PLAINTIFF,
vs.
A. B. WHITE, COLLECTOR, ET AL., DEFENDANTS.

This repliant, Wm. Butler, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto saith, that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied to, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

WM. BUTLER,
By FAULKNER & WALKER,
Sol's for Complainants.

(Endorsed:) Filed Oct. 19, 1897. L. B. Dellicker, clerk.

47 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Demurrer to bill.—Filed October 8, 1897.

In the circuit court of the United States for the district of West Virginia.

WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR OF INTERNAL REVENUE for the district of West Virginia, A. L. Hoult, John D. Sutton, & Anthony Staubley. } In equity.

The demurrer of the above-named defendants, A. B. White, collector, &c., John D. Sutton, and Anthony Staubley, to the bill of the above-named plaintiff.

These defendants, by protestation, not confessing nor acknowledging all or any of the matters or things in the said bill of complaint to be true, in such manner and form as the same are therein set forth and alleged, do demur to said bill, and for cause of demurrer show—

1. That it appears by the plaintiff's own showing in said bill that he is not entitled to the relief prayed by the bill against these defendants.

2. That the appointment to and removal from public office under the Government of the United States is not a ministerial act, but an executive act, and as such not subject to regulation or control by the courts.

3. That the powers of the Federal Government are divided among the legislative, executive, and judicial departments, and no
48 authority or right to control or regulate any one of the powers is vested in either of the other two.

4. That the plaintiff has no vested right in his position. He does not hold it by any tenure, and therefore has no such property rights therein as would give him standing in a court of equity to ask the relief of the court by injunction.

5. That a bill of injunction lies only to protect a property right.

6. That an injunction ought not to be granted restraining the defendant A. B. White from appointing to or removing from said office, because the power to remove and to appoint to said office is not vested in said defendant A. B. White. But the power to appoint storekeepers and *gua*gers is vested by law in the Secretary of the Treasury alone, and the power to fix their compensation is vested in the Commissioner of Internal Revenue under the limitations prescribed by law. (See Internal Revenue Laws, sections 3153, 3156, and 3157.)

7. That the power to assign *gua*gers and storekeepers to duty at any given place, and to terminate such assignment is vested by law in the Commissioner of Internal Revenue.

8. That the bill is based upon a misconception of the laws relative to the powers of the Secretary of the Treasury, the Commissioner of Internal Revenue, and collectors, as contained in Revised Statutes, sections 3153, 3154, 3155, 3156, 3156a, 3163, 3163a. (See also U. S. Internal Revenue Regulations and Instructions, page' 35, 120, 121.)

9. That it does not appear from the bill that the defendants Hoult, Sutton, and Staubley are not eligible to appointment and assignment under the civil-service law to the positions they are sought to be enjoined from taking.

10. That it does not appear from the bill that the defendants Hoult, Sutton, and Staubley had not already been appointed to such
49 positions, and had not already qualified at the time the bill was filed.

11. There can be no vested right in a *gua*ger or storekeeper to any particular assignment to duty. The right to change a particular assignment to duty of *gua*gers and storekeepers at will is vested in the Commissioner of Internal Revenue alone; and the exercise of that right does not affect and is not affected by the civil-service law.

12. That the act of Congress known as the civil-service law is unconstitutional.

13. That even is said act is constitutional it does not give to the plaintiff a right to invoke the aid of a court of equity, even to prevent his removal from office, and much less to prevent a change in his assignment to duty. And, even if constitutional, said act does not give the court authority to restrain in any manner the exercise of executive discretion, but leaves the appointing power untrammelled, save by moral and executive restraints and the fear of indictment for a violation of the act.

14. Where a discretion is vested by law in an executive officer concerning a matter purely executive, he can not be controlled in the exercise of such discretion by the courts, but must be left free in the first instance to exercise such discretion as he may see fit, although the results of his exercise of discretion may be subject to judicial review, and the officer himself subject to punishment for the manner in which he has exercised such discretion.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, the defendants do demur thereto; and they pray the judgment of this honorable court whether they shall be compelled to make any answer to the said bill; and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

JOHN W. MASON,
JOSEPH H. GAINES, *U. S. Atty.*,
50 *Counsel for Defendants.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JOSEPH H. GAINES,
Of Counsel for Defendants.

STATE OF WEST VIRGINIA,
County of Harrison, to wit:

A. B. White, one of the above-named defendants, on his oath, says that the foregoing demurrer is not interposed for delay.

A. B. WHITE.

Sworn to before me this 8th day of October, 1897.

L. B. DELLICKER, *Clerk.*

(Endorsed:) Circuit court U. S., dist. W. Va. Filed in office this 8th day of October, 1897. L. B. Dellicker, clerk.

51 In the United States circuit court for the district of W. Va.

WM. BUTLER
vs. } In equity.
A. B. WHITE, COLLECTOR, ET AL.

Joinder in demurrer.—Filed Oct. 19, 1897.

And the said Wm. Butler, the complainant, says that the said bill in equity and the matter therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said defendants to answer the same and the said complainant is ready to verify and prove the same as the court shall hereby direct and award.

WM. BUTLER,
By FAULKNER & WALKER,
Sol's for Complainant.

(Endorsed:) Filed Oct. 19, 1897. L. B. Dellicker, clerk.

52 WILLIAM BUTLER. vs. A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of William Butler.—Filed October 21, 1897.

In the circuit court of the United States for the district of West Virginia.

WILLIAM BUTLER. vs. A. B. WHITE, COLLECTOR, ET AL.

This day William Butler, complainant in the above bill, personally appeared before the undersigned, a notary public in and for the county of Jefferson, State of W. Va., and being by me first duly sworn, deposes and says:

That I am complainant in the above-entitled cause; that I was appointed a storekeeper by the Secretary of the Treasury in June, 1893, and have qualified as such by taking the oath of office and executing bond; that I was performing the duties of said office when the bill in this case was filed and the injunction granted by Hon. J. J. Jackson of said court.

That it is true, as set forth in the answer of said White, I received a telegram purporting to come from the Commissioner of Internal Revenue, dated 30th Sep., 1897, and received by me on the evening of that day, purporting to be a telegram relieving me from duty, but this affiant denies that he received any legal notice relieving him from duty before said injunction had been granted and served on the said A. B. White and others.

53 This affiant denies as true that said Ruckman was found by said Collector White in the storeroom of said distillery performing the duties of this affiant, but on the contrary the said Ruckman, having been served with the injunction aforesaid, declined to violate that injunction and so notified said White, collector as aforesaid.

The affiant further denies that he is incompetent to fill the position of storekeeper occupied by him at the time of the filing of the suit.

The affiant further denies that he is a Republican in politics, and on the contrary says that he is a Democrat, and he denies that in any conversation with A. B. White, collector, that he gave the said White to understand that he had voted for the Republican candidate for President of the United States at the last Presidential election.

The affiant further says he did not vote the Republican ticket, but that he voted the Democratic ticket.

WM. BUTLER.

Subscribed and sworn to before me this 16 Oct., 1897.

[NOTARY'S SEAL.] D. S. RENTCH, *Notary Public.*

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

54 WM. BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of J. C. McMahon.—Filed October 21st, 1897.

This day J. C. McMahon personally appeared before me, Geo. W. Johnson, notary, in and for the county of Berkeley and State of West Virginia, and after being duly sworn made oath as follows:

I am the same J. C. McMahon who was appointed to serve the copy of the injunction order in the above-entitled cause. Copies of these orders with the originals were placed in my hands to be executed on the 1st day of October, 1897. I proceeded at once to Martinsburg, arriving there the same evening, when I executed the process on the evening of the 1st of Octobor, 1897, upon the defendants F. T. Thayer, John D. Sutton, and on Oct. 2nd, 1897, on Anthony Staubley and J. G. Ruckman. On the 5th of October I received the same processes upon the same parties, there being some question as to the certificate of the clerk of the circuit court attached to the first processes served.

This affiant further says that he was present at this distillery in Martinsburg, on the 2nd of October, and saw whilst there J. G. Ruckman performing and exercising the duties of storekeeper in charge. I also saw there the same day Wm. Butler, asst. storekeeper, and H. C. Berry, *gua*ger, but was not present when they performed any duties of their respective offices, if any that day.

This affiant further says that he was present on the 2nd day of October, in the office at said distillery, when F. T. Thayer, between 10 and 11 o'clock, came to said office. In a few minutes after his arrival, H. C. Berry, the *gua*ger, came to the office, and after some conversation between them, which I did not hear. Standing near
55 them, while they were seated in the office, I heard in substance the following conversation: Mr. Berry asked Mr. Thayer if he had come out to the distillery for the purpose of taking possession of the office of *gua*ger and to take under his control the property of the Government that was incident to that office. Mr. Thayer replied that he believed those were his instructions. Mr. Berry answered, "If you will answer my question in the affirmative, we can settle this matter in 5 minutes." Mr. Thayer then replied that he had been instructed by Collector White to come out there that morning and take possession, but that these instructions were given before the injunction order had been served upon him, and he thought he had better go back to town and communicate with the collector and commissioner. He then left the distillery, and I did not see him out there again.

And further affiant sayeth nothing.

J. C. MCMAHON.

Subscribed and sworn to before me this 8th day of October, 1897.

GEO. W. JOHNSON,
[NOTARY'S SEAL.] *Notary Public.*

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

56 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of G. W. Wilson.—Filed October 21, 1897.

In the circuit court of the United States for the district of West Virginia.

WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

WASHINGTON, *District of Columbia, ss:*

G. W. Wilson, being first duly sworn, says that he is the Acting Commissioner of Internal Revenue; that W. S. Forman, the Commissioner of Internal Revenue, is in the State of Illinois and has been in Illinois continuously for the past three weeks. Affiant further says that the revocation of the assignment of the plaintiff as a storekeeper at the Hannis distillery was made by the said W. S. Forman, Commissioner; that affiant knew of said revocation at the time it was made and the circumstances and cause thereof, the same having come within the knowledge of affiant in the course and exercise of his official duties; that affiant knows that the said revocation and the assignment of J. G. Ruckman in the place of plaintiff were not made for political reasons or because of the political or religious opinions or affiliations of either the plaintiff or the said Ruckman, but because of other reasons involving the good of the service

G. W. WILSON,
Acting Commissioner of Internal Revenue.

Subscribed and sworn to before me this 19th day of October,
57 A. D. 1897.
[NOTARY'S SEAL.] JOHN T. BIVINS,
Notary Public.

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

58 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of A. B. White.—Filed October 21, 1897.

A. B. White, being first duly sworn, says that he is one of the defendants in the cause of Wm. Butler vs. A. B. White and others, now pending in the circuit court of the United States for the district of West Virginia; that he did not assign the defendant, J. G. Ruckman, as additional storekeeper at the Hannis distillery, nor did he revoke the assignment of the plaintiff, Wm. Butler, at said distillery. Affiant says that the assignment of said Butler was revoked and the assignment of said Ruckman made by the Commissioner of Internal Revenue, on the 30th day of September, 1897; that the affiant had nothing to do with

said revocation or assignment except to recommend the same to his superior officer, the Commissioner of Internal Revenue, which he did on the usual office form, No. 241, on the 27th day of September, 1897; that this is the usual manner prescribed by the rules and regulations of the Internal Revenue Bureau for the assignment and revocation of assignment of U. S. storekeepers; that said recommendation was made, as said affiant believes, for the good of the service, and because of the inefficiency of said plaintiff and not for political reasons.

Affiant further says that he was at said distillery on the first day of October, 1897, and found defendant, Ruckman, performing the duties of additional storekeeper, which had theretofore been performed by the plaintiff, Butler, who was not on duty that day and has not been on duty since.

A. B. WHITE.

Taken, subscribed, and sworn to before me this 18th day of
59 October, 1897.

U. S. G. PITZER,
Notary Public.

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

60 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order dismissing suit as to J. C. Ruckman, H. C. Berry, and League.—Entered October 6, 1897.

WM. BUTLER, &c.,
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

On motion of J. C. Ruckman, H. C. Berry, & League, by their attys., Faulkner & Walker, this suit is dismissed as to them.

Enter.

JACKSON, *Judge.*

Oct. 6, '97.

61 WM. BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order removing cause to Martinsburg, and giving leave to amend bill if amendment be deemed necessary.—Entered October 6, 1897.

This cause having been set for hearing this 6th day of October, 1897, upon the motion of the complainant for an injunction to be made absolute, restraining and inhibiting the defendant White, and other defendants named in the bill, and all other persons, from removing the complainant or revoking his assignment as storekeeper at the Hannis distillery in the district of West Virginia, or in any way interfering with him

in his said position as storekeeper. And the defendants not being fully advised at this time as to the defence they desire to make, it is ordered that this cause be set down for hearing on the 18th day of October, 1897, at Martinsburg, and the preliminary injunction heretofore awarded in this cause be continued until the further order of this court; and in the meantime the defendants are required to file any and all pleadings on or before the 9th day of October, 1897, it being agreed by counsel that, if the defendants wish to do so, they may file both demurrer and answer at the same time, and leave is given to the complainant to join in the demurrer, and to file exceptions to the answer, or take issue thereon, as he may elect.

And it is further ordered that, in the event the answer discloses such a state of facts as to render it necessary for him to amend his bill, then the further leave is given him to file on or before the 14th of October, 1897, his amended bill, and each side is allowed until the 18th to file affidavits in support of their respective rights.

Enter. JACKSON, *Judge.*

Oct. 6, '97.

62 WILLIAM BUTLER *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order authorising appointment of temporary guager and storekeeper pending the proceedings in this suit.—Entered October 12, 1897.

WILLIAM BUTLER *vs.* A. B. WHITE ET AL. } In equity.

J. G. RUCKMAN *vs.* A. B. WHITE ET AL. } In equity.

H. C. BERRY *vs.* A. B. WHITE ET AL. } In equity.

A. B. White, esq., the collector of internal revenue for this district, having represented to the court that there exists an actual necessity for a *guager* to *guage* spirits that may be manufactured into the bonded warehouse of the Hannis Distillery Company, and also that there is a necessity for an additional storekeeper to weigh in grain and to attend to meal rooms, etc., in connection with the operating of distillery, and unless authority is given to employ these additional laborers he will be unable to let the distillery be run, it is therefore ordered that leave be granted to him to employ the additional *guager* and storekeeper that he desires, pending the proceedings upon the injunction in this court. But this order is in no wise to affect the rights of any of the parties interested in these proceedings.

(Endorsed:) Enter. Jackson, judge. Oct. 12, '97.

63 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In chancery.

WM. BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In chancery.

and

H. C. BERRY
vs.
A. B. WHITE, COLLECTOR, ET AL. } In chancery.

Order docketing causes at Martinsburg.—Entered October 22, 1897.

This day came the plaintiffs in each of the above-entitled causes, by Messrs. Faulkner & Walker, their attorneys, and presented to the court the original papers in the above-entitled causes, together with a duly certified transcript from the circuit court of the United States for the district of West Virginia, sitting at Wheeling, remitting said causes to this court; and on their motion it is ordered that said several causes be docketed herein.

Enter.

JACKSON, *Judge.*

OCT. 22, '97.

64 WM. BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order continuing injunction.—Entered October 22, 1897.

In the circuit court of the United States for the district of West Virginia, sitting at Martinsburg, W. Va.

This case having been set for hearing on the 18th day of October, 1897, upon the motion of the complainant to have the injunction made absolute, and restraining and prohibiting the defendant White and other defendants named in the bill, and all other persons, from removing the complainant or revoking his assignment as storekeeper at the Hannis distillery, in the district of West Virginia, or in any wise interfering with him in his said position as storekeeper and upon the bill and exhibits filed by the complainant and the answer and demurrer by the defendants, and exhibits filed therewith, and affidavits filed, respectively, by the complainant and defendants, under agreement between the parties that the court consider both demurrer and answer, with the supporting proof, upon the motion for an absolute injunction, and was argued by counsel.

And the court not being ready at this time to pass upon the questions involved in the consideration of the motion, but the court desiring to take time for the consideration of the same, it is therefore ordered that the preliminary injunction heretofore awarded in this cause be continued until the further order of this court.

And A. B. White, esq., collector of internal revenue for this district, having represented to the court that the Hannis Distilling Company

have notified him of their desire to commence full operations and to run said distillery both day and night, and that in order that the interest
65 of the Government might be properly protected it is necessary that there should be 4 storekeepers and 1 additional *gua*ger assigned to duty at said distillery temporarily until the court can pass upon the questions involved in the 3 suits of H. C. Berry, J. G. Ruckman, and William Butler against A. B. White, collector, et al., which by agreement of parties has been heard by the court together, it is ordered that the injunction heretofore granted be modified to the extent of allowing the assignment of 4 storekeepers in all and 2 *gua*gers in all to the Hannis distillery, none of whom hold commissions as storekeepers and *gua*gers, or as such are assigned by the Commissioner of Internal Revenue from the district of West Virginia; but this provision shall have no application to J. G. Ruckman as storekeeper under the authority which he is exercising at the present time under the directions of the Commissioner of Internal Revenue, and none of the defendants to this suit shall be assigned to the said positions pending the further consideration of these causes by the court, and this order is not in any wise to affect or impair the rights or change the status quo of the parties interested in these proceedings.

Enter.

J. J. JACKSON, *Judge*.

OCTOBER 22, 1897.

66 WILLIAM BUTLER, PLAINTIFF, *vs.* A. B. WHITE, COLLECTOR, ET AL., DEFENDANTS, and H. C. BERRY, PLAINTIFF, *vs.* A. B. WHITE, COLLECTOR, ET AL., DEFENDANTS, and J. G. RUCKMAN, PLAINTIFF, *vs.* A. B. WHITE, COLLECTOR, ET AL., DEFENDANTS. } In equity.

Opinion.—Filed Nov. 8, 1897.

These causes are now heard upon the bills of plaintiffs and the demurrers and answers of defendants, which, by stipulation of counsel, are heard together.

The object and purpose of the bills is to restrain the defendant from removing the plaintiffs in this action from their present positions as gauger and storekeeper, respectively, in the Hannis distillery or transferring them to any other and subordinate positions in the same distillery.

These officers were commissioned by the Government and assigned to duty, and were in the active discharge of the functions of their respective offices when the defendant White was appointed collector of internal revenue for the district of West Virginia.

It is alleged in the bills that this defendant is about to remove the plaintiffs in these actions upon political grounds, and it is claimed that neither the defendant nor the appointing power has the right or power to remove the incumbents from their offices for political reasons.

The demurrers to the bills in these cases raise fourteen grounds of objection, which may all be embraced in three points.

First. Is the act of Congress known as the civil-service act, passed in 1871 and as amended in 1883, constitutional?

In considering this question it is well to refer to the history of the country which finally led to the passage of this act. The learned counsel who argued these cases on behalf of the plaintiffs reviewed, to some extent, the action of the various Administrations of this Government from that of Washington down to 1820, when Congress passed an act fixing, for the first time, the tenure of office for district attorneys and marshals of the United States. Prior to this time it appears that removals from office were comparatively few and that such action, when had, was always for causes other than political.

After the passage of the act of 1820 subsequent Administrations began to make changes in that class of officers who held their positions at the pleasure of the Executive. As the country grew, not only in territory but in population, the thirst and greed for office became so great that a growing necessity was felt that some legislation should be had to correct, as far as possible, the evils growing out of the existing system of appointments. Such was the condition of the public mind of the country that President Grant, one of the greatest men that ever occupied the Presidential chair, felt it incumbent on himself in his annual message of December 4th, 1870, to call the attention of Congress to the importance and necessity of reform in "the manner of making all appointments." He employs the following strong and striking language in his message, from which I quote:

"Always favoring practical reforms, I respectfully call your attention to one abuse of long standing which I would like to see remedied by this Congress. It is a reform in the civil service of the country. I would have it go beyond the mere fixing of the tenure of office of clerks and employes who do not require 'the advice and consent of the Senate' to make their appointments complete. I would have it govern, not the tenure, but the manner of making all appointments. There is no duty which so embarrasses the Executive and heads of departments as that of appointments, nor is there any such arduous and thankless labor imposed on Senators and Representatives as that of finding places for constituents. The present system does not secure the best men, and often not even fit men, for public place. The elevation and purification of the civil service of the Government will be hailed with approval by the whole people of the United States."

In pursuance of this recommendation of President Grant Congress, on the 3rd day of March, 1871, passed an act the purpose and object of which, amongst other things, was "to regulate admissions to the civil service." It appears, however, that this act was insufficient to accomplish the purposes for which it was framed. Its terms and provisions were so criticised that there was a consensus of opinion that further legislation was needed. President Arthur, influenced no doubt by the public sentiment of the country, felt it his duty in his annual message of
67 December 4th, 1882, to the Forty-seventh Congress, to call the attention of that body to this subject, in which he employed the

following language: "I trust that before the close of the present session some decisive action may be taken for the correction of the evils which adhere in the present method of appointment, and I assure you of my hearty cooperation in any measures which are likely to conduce to that end."

After this recommendation of President Arthur, Congress took up the subject and promptly passed an act "to regulate and improve the civil service of the United States," which was approved by the President on the 16th day of January, 1883. Bills were introduced in both Houses of Congress, but the bill that was passed by the Senate, after much discussion in the House, was passed by the House and approved by the President. In the discussion that took place upon this bill in the Senate, some of the most distinguished lawyers of that body participated, among whom were Senator Hoar, of Massachusetts; Senator Edmunds, of Vermont; Senator Brown, of Georgia; Senator George, of Mississippi; Senator Ingalls, of Kansas; Senator Cockerell, of Missouri, and Senator Allison, of Iowa. I refer to the utterances of these distinguished lawyers as part of the cotemporaneous history of this act, and it is to be observed that not one of these gentlemen entertained any doubts as to the constitutionality of this act, but the general trend of the discussion seems to have conceded its constitutionality. The utterances of both Senator Hoar and Senator Edmunds maintain its constitutionality, and the skeptical legal mind that differs with me and entertains doubts as to the constitutionality of the act is referred to the able discussions that took place at the time it was under consideration. This court might well content itself with what it has now said, but I am not either without authority or precedent upon this subject. The Constitution of the United States, article 1, section 2, paragraph 18, confers upon Congress the right "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Under this provision of the Constitution, Congress, as early as the 27th day of July, 1789, passed an act that "the head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." That act has been in force from the day of its passage to the present time. Here is a power conferred by the authority of Congress upon the head of each department, and is in no sense a delegated power of legislation. The evident purpose of Congress was to furnish each department with authority to regulate the conduct of its officers and employes and the distribution and performance of the business of the office. If such a power to legislate had been delegated under that act, the courts of this country would long since have been invoked to pass upon the power of Congress to delegate a power to the head of any department which alone belonged to it; but long acquiescence in the act is of itself sufficient evidence of the right of Congress to pass it. Judge Marshall, in his opinion in the case of McCulloch vs. State of Maryland, 4 Wheaton,

430, uses the following language, which I think appropriate to the discussion of the question under consideration:

"All must admit that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

In the case of Ex parte Curtis, 106 U. S., 371, this doctrine was again affirmed by the Supreme Court of the United States, in an opinion delivered by Chief Justice Waite, in which he uses the following language:

"That the Government of the United States is one of delegated powers only, and that its authority is defined and limited by the Constitution, are no longer open questions, but express authority is given Congress by the Constitution to make all laws necessary and proper to carry into effect the powers that are delegated. (Art. 1, sect. 8.) Within the legitimate scope of this grant Congress is permitted to determine for itself what is necessary and what is proper."

I assume that when Congress passed these acts it did determine for itself what was necessary and what was proper; that there was a necessity to remedy the evil growing out of the existing appointments to office, and that the acts passed were constitutional and therefore proper. Is it not competent and clearly within the legitimate scope of the powers of Congress, under the Constitution, to remedy an existing evil? If so, did
Congress in the passage of these acts exceed its legitimate power
68 under the Constitution? I think not. Under our system of government Congress by law is vested with the power alone to remedy existing evils; but it is the duty of the Executive, when Congress by an act applies a remedy, to see that the act is faithfully enforced. When Congress undertakes to apply a remedy to an evil by repealing an existing law, or by amending the law, or by the passage of an act which has for its object an improvement of the civil service of the country, can it be said that Congress has exceeded its power? I think not. If the time should ever come in the history of this Government when Congress can not regulate the administration of the civil service of the country, in my judgment it will be an untoward event which will strike at the very foundation of the existence of the Government.

I reach the conclusion that there can be no question as to the constitutional power of Congress to pass these acts. In support of this position I cite article 1, section 8, clause 18, of the Constitution of the United States; Marbury v. Madison, 1 Kranch, 137; McCulloch v. Maryland, 4 Wheaton, 421; Ex parte Hennen, 13 Peters, 259; Ex parte Curtis, 106 U. S., 371; United States v. Perkins, 116 U. S., 483.

The second ground of demurrer is that the assignment or revocation of assignment of these parties to duty is not protected by the provisions of the civil-service law or the regulations in pursuance thereof.

It is urged that the plaintiffs hold positions not technically in the executive civil service. I can not agree with this position. Rule 3, section 1, of the revised rules promulgated May 6th, 1896, declares "that all that part of the executive civil service of the United States which has been or may hereafter be classified under the civil-service act shall be arranged in branches, as follows: The departmental service, the custom-house service, the post-office service, the Government printing service, and the internal-revenue service."

Storekeepers and gaugers are appointed by the Secretary of the Treasury, and are required by the statute to take an oath to faithfully perform the duties of their offices and to give bond for the faithful discharge of their duties. The storekeepers are to receive a compensation not to exceed four dollars a day, to be determined by the Commissioner of Internal Revenue, and are not permitted to engage in any other business while in the service of the United States without the written permission of the Commissioner of Internal Revenue. The fees of gaugers are to be determined by the quantity gauged, under such regulations as the Commissioner may prescribe.

These places held by the plaintiffs are positions of honor and trust, and have attached to them a fair compensation. It is true that their duties are ministerial, yet the faithful discharge of them is so important to the Government as to require men of capacity and integrity. Section 6 of the same rule declares that "the internal-revenue service shall include officers and employes in any internal-revenue district who have been, or may hereafter be, classified under the civil-service act." By the direction of the President, the Secretary of the Treasury classified all persons not before classified in the internal-revenue service, except those merely employed as laborers or workmen and those whose appointments are subject to confirmation by the Senate, and made report to the Commission in pursuance of rule 12, section 1. It must be apparent that gaugers and storekeepers are either "officers or employes" in the Internal-Revenue Department, and it is immaterial whether they are officers or employes. In either event they are protected under the rules of the civil service, as they do not fall within the exception of rule 12, section 1.

The Acting Commission' of Internal Revenue, Mr. G. W. Wilson, reported to the Commission the classification of the internal-revenue service, which was approved by the Secretary of the Treasury. A provision of section 7 of the act is that after the expiration of six months from the passage of the act "no officer or clerk shall be appointed, and no person shall be employed to enter, or be promoted, in either of the said classes now existing, or that may be arranged hereunder, pursuant to said rules, until he has passed an examination or is shown to be specially exempted from such examination, in conformity herewith." But this act provides for certain exceptions, one of which is that persons who have been honorably discharged from the military or naval service are not required to be classified under this act. By rule 3, section 1, the internal-revenue service was placed in the classified service, and under section 6 there was included "the officers and employes in any internal-revenue district who have been, or may hereafter be, classified under the civil-service act." As we have seen, section 7 forbids the appointment of a person, after the expiration of six months from the passage of the act, until he has passed

an examination or is shown to be specially exempt from such examination in conformity with its provisions. The plaintiffs in these actions having been more than six months in possession of the offices from which it is now sought to remove them, no person can be appointed or employed to take either of said positions except as provided for in section 7, unless they fall within the exception to rule 9.

But it is claimed that the assignments made to take the places of the plaintiffs in these various actions do fall within the exception to
69 rule 9, which provides that "a vacancy in any position which has been, or may hereafter be, classified under the civil-service act may, upon requisition of the proper officer and the certificate of the Commission, be filled by the reinstatement, without examination, of any person who, within one year preceding the date of said requisition, has, through no delinquency or misconduct, been separated from a position included within the classified service at the date of said requisition, and in that department or office and that branch of the service in which said vacancy exists."

The answer to this position is that there are no vacancies, and until vacancies occur, under the rules of the civil service no assignments can be made. In the cases before us there are no vacancies in these positions, either by death or resignation, nor can there be vacancies by removal, unless they are in conformity with the civil-service act and the rules and regulations made under it. But it is insisted that this is not a removal but a transfer, and that under the provisions of section 3154, passed August 15th, 1876, the Commissioner may transfer any gauger or storekeeper. That section provides that "the Commissioner may also transfer any inspector, gauger, storekeeper, or storekeeper and *gua*ger from one distillery or place of duty or from one collection district to another." This section is mandatory and binding upon every officer of the United States who comes within its terms, but it does not authorize the appointing power to make the changes proposed by the defendant collector. It is obvious, from the reading of that section, that it only authorizes the Commissioner to transfer the officers mentioned in it from one place of duty to another place of duty in the same district, or from one collection district to another. It does not in express terms say that you may transfer the officers mentioned in it from one position to another in the same distillery. It was evidently the intention of Congress, in the enactment of this clause of that section, to permit transfers as I have indicated; but there is no provision for the reducing of a man in the grade or position that he has held. Congress evidently supposed that if it became necessary to remove or reduce a man for incompetency to a lower position in the same grade, that the appointing power might exercise the power of removal; but since the passage of the civil-service act that power of removal is now limited and controlled by it, which, being a subsequent act to section 3154, so far as they are in conflict with each other, limits and controls the Commissioner in his action. It is idle to say, as in the instance of Ruckman, in this case that where he has held the position of "head or day storekeeper" that he can be changed or transferred from that position to that of "additional storekeeper," which is a change in rank, without nullifying the civil-service act and the rules in force under it. A transfer of this

character from the "head or chief position" to a secondary position, as that of "additional storekeeper" necessarily must be, is a change of rank in a public position, which is necessarily a removal that can only be made under the civil-service act and the rules formulated under it. Can it be said that a transfer or assignment in the same distillery from one position to another does not operate as a removal from one position to the other?

Is not the position from which the officer is transferred vacated, and is he not placed in a new position? What can be the object and purpose of a transfer unless it is to remove the incumbent from the position he occupies? As we have before said, these officers held their positions before and at the time the present collector was appointed and entered upon the discharge of his duties on the 1st day of July, 1897. It is obvious from what appears in these cases that the present collector is attempting to secure a change in positions or a revocation of assignments of these officers, and to substitute others in lieu of them. If there were vacancies in these offices, of course he would have the right to make recommendations to the Commissioner to have persons appointed to fill the vacancies; but there are no vacancies, and none can be created except in the case of death or resignation or in conformity to the civil-service act and the rules promulgated under it. It has been held that an appointment to an office operates as a removal of the then incumbent. An office when once filled can not be deemed vacant until the term of service expires or until the death or removal or resignation or abandonment of the incumbent. (5 Waite's Act. & Def., sect. 14; Keenan v. Terry, 24 Texas, 253; Johnson v. Walker, 2 N. H., 202.)

By a provision of section 2, clause 2, of the civil-service act, their positions can only be filled by selection, according to grade, from amongst those graded highest as the result of competitive examination. It is true that by a provision of rule 9 certain exceptions are made to that rule, and it is claimed that these parties fall within the exception because they have heretofore held these positions and seek to be reinstated therein. If, however, there were vacancies, the appointments to fill the positions, to be legal, should be made in pursuance of section 2, clause 2, in connection with the exceptions contained in rule 9; but there is no pretense upon the part of the appointing power that they ever
70 intended to comply with those provisions of the law. The effort to remove these officers seems to be in violation of the Executive order of July 27th, 1897, amendatory to civil-service rule 2, which provides that "no removal shall be made from any position subject to competitive examination except for just cause, upon written charges filed with the head of the Department or other appointing officer, of which the accused shall have full notice and an opportunity to make defense." The present incumbents hold positions of honor and trust, which positions, I hold, are within the provisions of the civil-service act and the rules formulated and adopted in pursuance of it. If I am correct in this position, then these incumbents could only be removed in the manner provided for by that act and the Executive order of July 27th, 1897. It seems to me no grounds have been shown for their removal except "for the good of the public service." This is a reason that was employed by the officers of the Government when they desired to remove any one that

was obnoxious to them long prior to the passage of the civil-service act. It is too general, vague, and indefinite to authorize the removal of an officer under existing law. By the very terms and provisions of the rule just referred to he has to be confronted with the charges that are made against him and to have full notice and an opportunity to make defense. No charges of a specific character have been preferred against these officers; no notice has been served upon them of any charge; and no opportunity has been furnished them to meet the vague and indefinite charge, "for the good of the public service." The very object and purpose of the rule which was promulgated on the 27th day of July, 1897, was to furnish a full opportunity to every officer who was within the civil service to meet any charges made against him. This has not been done in this instance, and I must hold that under the rules formulated by the President and the Civil Service Commission, and promulgated by that Executive order, that the effort to remove the officers in question is illegal. The rules promulgated by the President and the Commission are clearly within their scope and power under the act of Congress, and when they exercise the power to limit and restrict the power of removal as they deem best for the public interest, it is only the execution of a duty imposed upon them by Congress, and which should be effectually performed and fully complied with.

To my mind it is clear that storekeepers and gaugers are employes of the Government that are protected by the rules and regulations promulgated under the civil-service act by the Executive and the Commission; that a revocation of the assignments, or transfer of the plaintiffs in these actions, is in effect a removal, and that a removal for political reasons falls within the inhibition of the civil-service act and the rules promulgated under it; that there can be no appointment to any position unless there is a vacancy, and that the vacancy must be filled in conformity to the provisions of the civil-service act and the rules made under it.

The third ground of demurrer is that a court of equity can not enjoin an officer or party from exercising the power of removal.

I have heretofore discussed this question in the case of Priddie v. Thompson, United States marshal for this district, and although some of my brothers have differed with me in the conclusions I reached in that case, yet I have seen nothing emanating from them to shake my convictions. (Fed. Rep., Nov. 2, 1897.) In discussing a grave and important question of this character, it is well sometimes to have recourse to first principles. Story, who is a standard authority, says that "equity has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence where a plain, adequate, and complete remedy can not be had in the courts of common law." (1 Story Eq., 12 ed., sect. 33; 1 Cooper's Eq. Pl., 128, 129; Medford's Pl. in Eq., by Jeremy, 122, 123; 1 Wood's Lectures, 7, pp. 214, 215.)

"The remedy must be plain; for if it be doubtful and obscure at law, equity will assert jurisdiction. It must be adequate; for if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity." Accepting this definition as not only precise but descriptive of the powers of a court of equity, does not the case under consideration fall within the jurisdiction of such a court? In the bills filed in these

cases it is alleged that the plaintiffs have not only an interest in, but a right to, the possession of the offices they hold, and their emoluments, and to that extent a vested right of which they cannot be deprived except by operation of law, and not by the capricious action of a superior officer. Has not a person who holds and is in pos'ession of an office to which there is a fair salary attached to remunerate him for his services a right to the protection of the law to prevent an injury to him by the doubtful assertion of the rights of another as to his office? Has he not a material interest in the possession of the office and the salary attached to it? If he has such an interest in the office and emoluments, is there not a right which should be recognized and protected by the law in the employment of it? The fact that another party desires and seeks
71 the office is evidence of its value to him, and if it is valuable to the one seeking it, surely it must be to the one holding it. If no value was attached to the position, there would be no occasion for these proceedings. The fact that they have been instituted to protect the incumbents in the enjoyment of their offices is conclusive evidence that there are some rights involved.

What, then, is the most complete remedy afforded? The plain answer to this question is that the only remedy that is adequate and complete must be of a preventive character, which seeks to restrain the defendants from ousting the plaintiffs from their positions. There can be no legal remedy, for the reason that the incumbents, when once ousted from their positions, have no recourse whatever. The plaintiffs are entitled to a preventive remedy to preserve the "status quo" until the titles to the different positions and offices can be settled by some legal proceeding. Equity alone furnishes that remedy, and if this remedy does not exist, then there is a case of an alleged wrong without a remedy. In the progress of a civilization that is giving us railroads, telegraphs, telephones, and numberless other things, all of which are regarded as necessary to both our business and social life, it often becomes necessary to invoke the latent powers of our jurisprudence as a necessity arises which requires it. This jurisdiction is only the application of existing powers in a court of equity to a new case. Courts of equity have exercised their jurisdiction permitting officers de facto of a school district to restrain persons claiming to be officers de jure, but are not in possession, from taking possession of a schoolhouse and from interfering with the officers de facto in the employment and management of school affairs. (Braidley v. Sweetland, 13 Ks., 41.) The question involved in these proceedings may be said to be analogous to the case just referred to. This injunction is to restrain the defendants from interfering with the plaintiffs in the possession of their offices and is in no sense to try the right of possession or title to the offices. Proceedings by injunction cannot be used for that purpose. I think the foregoing views are clearly sustained by Story's Equity Jurisprudence. But I do not rely upon text-books alone to support my views as to this position. In Waite's Actions and Defenses there will be found many references where courts of equity have exercised this jurisdiction where there was a controversy between parties claiming the same office. It will never be assumed to oust a person from an office under a color of title until his right to such office has been determined; but it will be exercised to protect a party in the possession of his office until he

has been ousted by a legal proceeding. In a well-considered case by the supreme court of Louisiana it was held that an officer cannot be dispossessed by a third person whose title he disputes until the latter shall first try the disputed right, and the learned judge who delivered the opinion of the court cites the case of Braidley v. Sweetland, 13 Ks., 41; Palmer v. Foley, 45 How. Pr., 110. The reason is very obvious that a claimant cannot take the law in his own hands, even with the assistance of others, to oust an incumbent in advance of judicial 'termination of the disputed right, and that court held that "the claimant and all others may be properly enjoined from interference with the party in possession of the office until the dispute can be judicially settled." (Guillotte v. Poyney, 5 L. R. A., 403.) In the case of Ex parte Sawyer (124 U. S., 402), Chief Justice Waite, referring to the remedy by injunction, uses the following language, which seems to support the view I have taken of the question under consideration: "I can easily conceive of circumstances under which a removal, even for a short period, would be productive of irremediable mischief. Such cases may rarely occur, and the propriety of such an application may not often be seen, but if one arises, and if the exercises of the jurisdiction can ever be proper, the proceedings of the court in due course upon a bill filed for such relief will not be void even though the grounds upon which it is asked may be insufficient." The law as thus laid down by the learned Chief Justice in the case cited would seem to dispose of the question under consideration.

In the case of Marbury v. Madison, 1 Cranch, 167, Chief Justice Marshall uses the following language: "But where a specific duty is assigned by law and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy." Specific duties in the cases of these plaintiffs are assigned to them by law, viz, the duties of gauger and storekeepers. The "individual rights" or the rights of the owners of the distillery to which they have been assigned for duty depend to a great extent upon the faithful performance of their duties. They claim to have an "individual right" in the offices they respectively hold, and they conceive themselves to be injured in their rights when there is an effort to remove them from their positions. Under the authority of the cases cited I hold that they have a right to resort to the courts of their country for a remedy. If they can not resort to the courts for a preventive remedy to stay the hand of the appointing power in removing them from their positions, then they have no remedy, although the act of the appointing power may be in
72 violation of the civil-service act and the rules made under it. It can not be said that where Congress by its act has undertaken to limit and restrain the appointing power, and the appointing power attempts to nullify the plain provisions of the act, that there is no remedy. High on Injunctions says that "the plaintiff says: 'I am the actual incumbent in possession of the office to which I claim to be legally entitled. Defendant, claiming under a title the validity of which I dispute, is seeking to oust me extrajudicially,' in which effort he will have the aid of my fellow-members on the board, and I ask judicial aid to to protect my incumbency to the position until defendant shall, in due course of judicial procedure, establish his right and title. Such an action

falls within a well-recognized branch of relief by injunction. While courts of equity uniformly refuse to interfere by the exercise of their preventive jurisdiction to determine questions relating to the title to office, they frequently recognize and protect the possession of officers de facto by refusing to interfere with their possession in behalf of adverse claimants, or, if necessary, by protecting such possession against the interference of such claimants, and the granting of an injunction in such a case in no manner determines the question of title involved, but merely goes to the protection of the present incumbents against the interference of claimants out of possession and whose title is not yet established.' " (2 High on Injunctions, 2 ed., sec. 1315.)

It is said by the learned judge who delivered the opinion of the supreme court of Louisiana, supra, that the doctrine as laid down by High "is in the interest of social peace and order and conforms to the object and policy of the law in all remedial provisions for the settlement of disputed rights, which always respect and maintain the status quo until the controversy shall be settled in the orderly course of judicial procedure." "Plaintiff," he says, "is undoubtedly the de facto officer, because he claims the office and is in possession of it, performing the duties under color of appointment." (Waite's Ac. & Def., page 7, paragraph 9; Buckman v. Ruggles, 15 Mass., 180; Commonwealth v. McCombs, 56 Pa., 436; State v. Howe, 25 Ohio St., 588; Braidey v. Therett, 17 Ks., 468.)

A recent work entitled American and English Decisions in Equity, vol. 3rd, page 440, lays down the principles and quotes the authority to sustain it: "* * * the actual incumbent of an office, whether de jure or de facto, if duly qualified and in office by virtue of a certificate of election issued by the proper officers, will be protected by injunction against unlawful interferences with his possession thereof. (Brady vs. Sweetland, 13 Kas., 41; Braidy vs. Therett, 17 Kas., 468; Guillotte vs. Poicy, 41 La. An., 33; Palmer vs. Foley, 45 How. Pr. (N. Y.), 110; State vs. Superior Court of Snohomish Co. (Wash.), 48 Pacific Rep., 741; as by illegally electing another in his stead; Wheeler vs. Bd. of Fire Comrs., 46 La. An., 731; or by removing him without authority; Armitage vs. Fisher, 74 Hun. (N. Y.), 167. It will also sometimes interfere to protect the interests of the public, e. g., when two different bodies claim to act as the common council of a city; Kerr vs. Trego, 47 Pa., 292.")

The plaintiffs in these actions are all officers de facto if not de jure, claiming the possession of their offices and performing the duties under color of appointment. I therefore reach the conclusion that the plaintiffs have a right and interest involved in the offices they hold, and that that right and interest is questioned by the defendants in these cases, and that the only legal remedy they have to protect themselves in the enjoyment of their various offices as against those who are seeking to oust them is the restraining power of this court to prevent interferences with their possession until the titles to the offices have been settled by due course of law. It follows from what I have said—

First. That the act known as the "civil-service act" is constitutional.

Second. That Congress has not delegated to the President and the Commission legislative powers.

Third. That by rule 3, section 1, the internal-revenue service has been placed under the civil-service act and rules made in pursuance of it.

Fourth. That the plaintiffs in these actions are officers of the Government in the internal-revenue service.

Fifth. That they can not be removed from their positions except for causes other than political, in which event their removal must be made under the terms and provisions of the civil-service act and the rules promulgated under it, which, under the act of Congress, became a part of the law.

Sixth. That the attempt to change the position and rank of the officers in these cases is in violation of law.

Seventh. That a court of equity has jurisdiction to restrain the appointing power from removing the officers from their positions if such removals are in violation of the civil-service act.

For the reasons assigned the demurrers to the bills will be overruled.

I come now to consider the defense raised by the answers other than the questions of law, which were disposed of on the demurrers. The main question for consideration is a question of fact. The contention of the defendants is that they were not served with the injunction before the Commissioner had attempted to vacate the positions of gauger and storekeeper by the transfer or assignment of others to the positions of Ruckman,
73 Butler, and Berry. From the answer of Collector White, as well as from his affidavit and the affidavits of the Commissioner, it appears that there was for some reason hasty action in regard to these officers. The action by the Commissioner was taken by him on the evening of September 30th, by wire, when he notified the plaintiff Ruckman of his transfer and the plaintiffs Butler and Berry of the revocation of their assignments. The collector claims that he was present on the morning of October 1st to execute the telegraphic order of the Commissioner. As we have before said, these plaintiffs, being officers of the Government, were not removable at the will or caprice of the Commissioner, and the Commissioner, also being an officer of the Government, his action in this matter must conform to the law and not be in violation of it. The evidence does not show that the Commissioner sent any commissions to the defendants Thayer and Sutton, who were assigned to take, respectively, the offices of gauger and head storekeeper, before the time that they were served with the notice of the injunction restraining them from interfering with the possession of the incumbents. No officer in charge of an official position would be justified in turning over his position to his successor until that successor had appeared with his commission and taken the oath and given bond as required by law. The evidence does not disclose that a single one of any of these prerequisites of the law had been complied with before the service of the injunction. It is very apparent that what was done in regard to these removals was done in haste. One thing is clear both from the answer and the affidavit of Collector White—that he does not deny the fact that he knew of the intended application for an injunction or that the injunctions had been allowed. This is a significant fact, tending to show either that he was very ignorant of what was going on or that he carefully avoided committing himself either as to the application or the pendency of the injunction. But he must have known of the allowance of the injunction in the Butler case, which was allowed in term time, in open court, on the 29th day of September, and the evening of the very next day there was an attempt to transfer Ruckman and to revoke the assignment of Berry. It can not be doubted that he knew of the Butler

injunction, for a copy of the process was left with his wife at his residence on the 29th day of September, as shown by the marshal's return; hence his attempt to have Ruckman transferred and Berry's assignment revoked before they secured injunctions, though he had recommended their appointments on the 27th to the Commissioner. If he knew of the allowance of the injunctions he was bound to respect them as much as if he had been served with notice. Upon the question of notice and service of the order of injunction there is some conflict in the evidence. I will consider the evidence in the cases of Butler and Ruckman together, as the same affidavits apply to both cases. Ruckman, who was head storekeeper, swears that he did not surrender his possession; that at the time the injunction was served on White he was in possession of his office, discharging his duties; that he did not take upon himself and discharge the duties of additional storekeeper, the position held by Butler; that he only received notice of his transfer from head storekeeper to additional storekeeper at 10.55 a. m., October 2nd, 1897, and that this information was contained in a letter from the collector, mailed from Parkersburg at 4 p. m. of October 1st. He further states that Sutton admitted to him on the 1st day of October that he had received no authority from the defendant to act as storekeeper, and that the authority reached him on the morning of October 2nd. Ruckman could not have acted as additional storekeeper, for the reason that his assignment was cancelled by wire October 2nd, the same day that he received notice that Sutton was to take his place. Sutton was to take Ruckman's place and Ruckman was to take Butler's, but Ruckman's place was never vacant, or, if it was, he was directed by wire on the evening of October 2nd to remain in charge of the warehouse until further orders. It is apparent that Sutton never took possession of the warehouse, or, if he did, he was superseded by the order directing Ruckman to remain in charge, which, by its terms, shows that he was to continue in his position and not to vacate it.

Butler testifies that he was in the actual service of the Government at the time the injunction was served on White, and that Ruckman did not take his position nor did he (Ruckman) perform the duties of additional storekeeper, for the reason that he had been served with the order of injunction and declined to perform the duties of the office held by affiant. The deputy marshal says that the process was served on Ruckman on the evening of the 1st of October. Faulkner proves that Berry handed a letter to Ruckman on the morning of the 2nd of October, authorizing Ruckman to act as additional storekeeper. Ruckman swears that at the time of the service of the injunction in this case upon Sutton (who admits that it was about 9 o'clock on the night of October 1st) he was performing and discharging the duties of head storekeeper at the distillery. The affidavits of White and Sutton contradict the sworn statements of Butler, Ruckman, Faulkner, and the deputy marshal. The weight of evidence as to the notice seems to be and is with the plaintiffs. It is unfor-
74 tunate that this conflict should have occurred. One thing is evident: That Butler has never surrendered his position and, so far as the defendant Ruckman is concerned (who does not claim it, but who insists upon his right to hold the position of head storekeeper), Butler holds his position adverse to Ruckman.

In the case of Berry, gauger, the same character of conflicting evidence exists as in the cases just passed upon. Berry denies that Thayer entered upon the duties of gauger on the 1st day of October, but swears that he was in possession of the property as gauger. Berry states that on October 2nd, 1897, Thayer came out to the distillery and, after asking him if he was the gauger in charge, showed him a telegram purporting to come from the Commissioner of Internal Revenue, assigning him as gauger at said distillery. This affidavit is supported by the affidavits of Faulkner and McMahan. It is contradicted by White and Thayer as to the time when Thayer took possession of the office and as to the time of the service of the injunction. The marshal testifies that they were served the evening of October the 1st with a copy of the injunction. Faulkner and McMahan sustain Berry as to what occurred on the morning of the 2nd day of October, from which it clearly appears that Thayer came that morning to take possession of the office. The only two disinterested witnesses to all of these occurrences, and particularly as to the time of the service of notice, are Faulkner and McMahan. Both of these witnesses sustain Ruckman, Butler, and Berry. The affidavits of both White and Thayer say they were at the distillery on October 1st, and that Berry was not there and could not therefore turn over the possession of any Government property in his charge to Thayer. But White says there was no Government property to turn over. The Commissioner required him to turn it over, but the collector says there was none to turn over. By reference to the "Regulations and Instructions Concerning the Tax on Distilled Spirits," under the Revised Statutes of the United States, and subsequent acts, issued February 19th, 1895 (pages 14 and 15), the act says: "That gaugers are made custodians of cistern rooms, and that under no circumstances will they entrust the key to the lock on the door of the receiving room to any person other than the collector of the district." A pertinent question arises: Did Berry turn the keys of the cistern room over to Thayer? It is not claimed that he did, but, on the contrary, Berry states that "on the 2nd day of October I was still in the possession of the property of the Government, as well as the keys, which, as such gauger, it is my duty to hold," which contradicts the statements of Thayer and White as to the possession of the office.

Another pertinent question is, What became of the gauger's outfit, consisting of box containing hydrometer cups, hydrometer, and stems, with which each gauger is supplied, which is the property of the Government? The law says: "Standard hydrometers are supplied for the use of internal-revenue gaugers, at the expense of the Government." (Regulations and Instructions Concerning Tax on Distilled Spirits, p. 123.) Did Berry have any distillery stamps and did he turn over any to Thayer? (Same, page 14.) I might refer to other things to show that every gauger is in possession of property of the Government, and when he is removed must turn it over to his successor in office. No outfit was turned over to Thayer, which shows that possession was not surrendered by Berry to Collector White or Thayer. It is apparent that Collector White is at least under a great misapprehension as to what is the outfit of a gauger, when he says in his affidavit of October 19th, 1897, "that Berry had no property in his possession to turn over to the defendant Thayer to complete Thayer's assignment." He may entertain hon-

estly that conviction, but I must hold that it is a mistaken conviction and does not accord with the statutes cited supra.

I reach the conclusion that the preponderance of evidence is with the plaintiffs, and that neither the gauger nor storekeepers have ever vacated or surrendered their offices or positions; that in contemplation of law they are in the legal custody of their offices and can only be displaced by proceedings instituted under the Executive order of July 27th, 1897; that the offices not having been surrendered and the injunction being served while plaintiffs were in possession, it was effective to prevent the interference of the defendants with the plaintiffs in the possession of their offices.

I deem it unnecessary to discuss the competency of the plaintiffs for their positions, though the evidence tends strongly to show that they were fully competent, having served in those positions since 1893.

One other position of the plaintiffs remains to be noticed, and that is that under the legislative and judicial act of 1885, reenacted in 1886, the collector is prohibited from recommending to the Secretary of the Treasury for appointment more officers of this class than fifteen per cent in excess of the number engaged in performing the duties at the time. It is very clear from the affidavit of Ruckman that the act has been violated, but it is not necessary to rest the case upon this position.

I think that both the law and the facts are with the plaintiffs, and the injunction heretofore awarded must be made perpetual.

(Endorsed:) Filed Nov. 8th, 1897. L. B. Dellicker, clerk.

75 WM. BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order perpetuating injunction.—Entered November 8, 1897.

This cause came on to be further heard this 8th day of November, 1897, upon the bill, demurrer to bill, joinder in said demurrer, the answer by the defendants, general replication to said answer, affidavits filed therein, and upon the motion of the plaintiff to perpetuate the injunction heretofore awarded; upon consideration whereof, the court is of opinion to perpetuate the injunction and to make the same absolute, restraining and inhibiting the defendant White, the collector of this district, the appointing power, and the defendant J. G. Ruckman and all others from in any wise interfering with the plaintiff, Wm. Butler, in the possession of his office, and in the discharge of his duties as storekeeper at the Hannis distillery, located in the town of Martinsburgh, W. Va., until he shall be removed by proper proceedings under the civil-service law, and the rules and regulations made in pursuance thereof, or by judicial proceedings at law; and the said collector having heretofore applied to the court for leave to appoint temporarily a storekeeper, pending this litigation, he, the said collector, is required and directed to discharge such temporary storekeeper, if appointed under said order, and to permit the said storekeeper, Wm. Butler, undisturbed to discharge the duties of his office as storekeeper, unless hereafter removed as hereinbefore provided.

And the counsel for the defendant having requested the court to grant an appeal in this case, this order is suspended for the period of
76 ten days to allow them to file their petition and assignment of error and give bond for the perfection of the appeal, and the opinion filed by the judge of this court is ordered to be made a part of this record. Enter.

JACKSON, *Judge.*

Nov. 8, '97.

77 WM. BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Petition for appeal.—Filed Nov. 17, 1897.

In the circuit court of the United States for the district of West Virginia.

WM. BUTLER, PLAINTIFF, APPELLEE,
vs.
A. B. WHITE, COLLECTOR OF INTERNAL REVENUE for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin T. Thayer, defendants, appellants. } In equity.

The above-named defendants, conceiving themselves to be aggrieved by the order entered on the 8th day of November, 1897, in the above-entitled cause, do hereby appeal from said order to the Supreme Court of the United States, and they pray that this their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

JOSEPH H. GAINES,
Attorney for the Defendants.

CHARLESTON, WEST VIRGINIA, *Nov. 16th, 1897.*

And now, to wit, on November 16th, 1897, it is ordered that the above appeal be allowed as prayed for.

J. J. JACKSON,
United States District Judge, District of West Virginia.

(Indorsed:) Filed Nov. 17, 1897. L. B. Dellicker, clerk.

78 WILLIAM BUTLER, APPELLEE,
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Assignment of errors.—Filed Nov. 17, 1897.

In the circuit court of the United States for the district of West Virginia.

WILLIAM BUTLER, APPELLEE,
vs.
A. B. WHITE, COLLECTOR, ETC., ET AL., APPELLANTS. } In equity.

Assignment of errors.

And now, on the seventeenth day of November, in the year of our Lord one thousand eight hundred and ninety-seven, come the above-

named appellants and file with their petition for allowance of appeal to the Supreme Court of the United States this their assignment of errors, and say that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit:

I.

That the allegations of plaintiff's bill do not show a proper case for the granting of an injunction.

II.

That the demurrer of defendants should have been sustained and the bill dismissed.

III.

That the act of Congress of the day of , 1883, known as the civil-service law, and the several Executive orders, rules, and regulations made in pursuance thereof, are unconstitutional and should have been so held. A court can not enjoin the removal from office of one holding an inferior appointive office, nor in any manner control such removal.

79 IV.

A court can not enjoin an appointment to an inferior appointive office, or otherwise control such appointment.

V.

The power to appoint to and remove from the inferior appointive offices of the Government belongs exclusively to the Executive Department of the Government, and is not subject to any kind of intervention or control by the judiciary.

VI.

The civil-service law, if constitutional, does not give even to these officers within its provisions any right to resort to the courts to prevent their removal, or to hold them in office after removal by the proper executive authority, having power to appoint and remove, pending the determination of a question whether such removal was in contravention of the civil-service law.

VII.

Even if the civil-service law is constitutional and in any case has been violated, the remedy, if any, is executive and administrative, not judicial.

VIII.

That assignment to duty and the revocation of such assignment of storekeepers and *gua*gers are not affected by the civil-service law.

IX.

That the power to make such assignments and to revoke them instantly, and at the will of the Commissioner of Internal Revenue, is a power essential to the best interests, and even to the honest administration of, the internal-revenue service.

X.

That revocation of assignment of storekeepers and *guagers* is not a removal from office; and no attempt to remove the plaintiff from office has been made.

80

XI.

That the record shows that the Commissioner of Internal Revenue, who made the assignment and the revocation complained of, did not do so for political reasons, but for the good of the service, and the court should have so found, and should have refused the injunction.

XII.

That the record shows that the revocation and assignment complained of were made, and J. G. Ruckman substituted in place of plaintiff, before the service or other notice of the temporary order of injunction; and the court should have so held, and should have refused the injunction.

XIII.

That the honorable circuit court of the United States for the district of West Virginia, on the whole record, should have refused the injunction and dismissed the defendants.

Wherefore the said defendants and appellants pray that the decree and order of injunction of the said circuit court of the United States for the district of West Virginia may be reversed and dismissed.

JOSEPH H. GAINES,
Attorney for Appellants.

Charleston, West Virginia.

(Endorsed:) Filed Nov. 17th, 1897. L. B. Dellicker, clerk.

81 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Appeal bond.—Filed Nov. 18, 1897.

Know all men by these presents, that we, A. B. White, of the city of Parkersburg, in the State of West Virginia, as principal, and L. M. La Follette and M. A. Kendall, as sureties, are held and firmly bound unto William Butler in the full and just sum of five hundred dollars to be paid to the said William Butler, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by

these presents. Sealed with our seals and dated this 18th day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a circuit court of the United States for the district of West Virginia, sitting at Martinsburg in said district in a suit depending in said court between William Butler, against A. B. White, collector of internal revenue for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin T. Thayer, a decree was rendered against the said A. B. White, collector of internal revenue for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin T. Thayer, and the said A. B. White, collector of internal revenue for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin T. Thayer having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said William Butler, citing and 'monishing him to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the day in the said citation mentioned:

82 Now, the condition of the above obligation is such that if the said A. B. White, collector of internal revenue for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin Thayer shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

A. B. WHITE. [SEAL.]
L. M. LA FOLLETTE. [SEAL.]
M. A. KENDALL. [SEAL.]

Sealed and delivered in presence of—
L. B. DELLICKER.
L. B. DELLICKER.
L. B. DELLICKER.

Approved by—

J. J. JACKSON,
U. S. Dist. Judge.

Nov. 18, '97.

(Endorsed:) Filed Nov. 18th, 1897. L. B. Dellicker, clerk.

83 UNITED STATES OF AMERICA, *ss:*

The President of the United States to William Butler, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, on the 18th day of December, 1897, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein A. B. White, collector of internal revenue for the district of West Virginia, A. L. Holt, John D. Sutton, Anthony Staubley, and Franklin T. Thayer are plaintiffs in appeal and you are defendant in appeal, to show cause, if any there be, why the decree rendered against the said plaintiff in appeal, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable John J. Jackson, judge of the district court of the United States, this 18th day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

J. J. JACKSON.

WILLIAM BUTLER
v.
A. B. WHITE &c. } Citation.

Service of the within writ acknowledged.

WM. BUTLER,
By FAULKNER & WALKER,
His Attorneys.

Nov. 22d, 1897.

Filed Nov. 22d, 1897. L. B. Dellicker, clerk.

84 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order for transcript of record and proceedings.

And thereupon it is ordered by the court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Supreme Court; and the same is transmitted accordingly.

Test:

L. B. DELLICKER, *Clerk.*

85 WILLIAM BUTLER
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Clerk's certificate.

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do certify that the foregoing record is a true, full, and correct transcript of the record and proceedings had in the above-entitled cause, together with all things thereunto relating, as the same appear upon the files of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Martinsburg, at said district, this 11 day of December, A. D. 1897.

[SEAL.]

L. B. DELLICKER, *Clerk.*

(Indorsement on cover:) Case No. 16753. West Virginia, C. C. U. S. Term No., 540. A. B. White, collector of internal revenue for the district of West Virginia, et al., appellants, vs. William Butler. Filed December 18, 1897. Office Supreme Court of U. S. Received Dec. 18, 1897.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 541.

A. B. WHITE, COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF WEST VIRGINIA, ET AL., APPELLANTS,

v.

J. G. RUCKMAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

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1 THE UNITED STATES OF AMERICA,
District of West Virginia, to wit:

At a circuit court of the United States for the district of West Virginia, begun and held at the court-house in the city of Martinsburg on the 15th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable J. J. Jackson, district judge.

Among other were the following proceedings, to wit:

2 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Bill.—Filed October 1st, 1897.

In the circuit court of the United States for the district of West Virginia, sitting at , in said district.

J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR OF INTERNAL REVENUE for the district of West Virginia, A. L. Hoult, John D. Sutton, and Anthony Staubly. } In equity.

To the honorable the judges of the said court, your orator respectfully shows unto your honor:

First. J. G. Ruckman was duly appointed by the Secretary of the Treasury of the United States a United States storekeeper in 1893, and has been from that time until this such storekeeper of the United States at the Hannis distillery, at Martinsburg, West Virginia, where he has remained from that time until this in said official position.

Second. Your orator would further show that he was appointed to his position as aforesaid through the recommendation of E. M. Gilkeson, late collector of internal revenue for the district of West Virginia, as provided by an act of Congress in such case made and provided.

Third. Your orator would further show that he is paid at the rate of $4.00 per day while on duty by the internal-revenue collector for the district of West Virginia as a disbursing agent of the Treasury Department, and that your orator is an officer of the United States Government, and as such has taken the oath of office and executed bonds as required by law, and that said oath of office and bond continues good and in force, regardless of the personnel of the collector of internal revenue for said district, and that he does not hold his position at the discretion or upon the sufference of the collector of internal revenue.

3 Fourth. Your orator, further complaining, says that since his incumbency in said office he has honestly, faithfully, and impartially discharged the duties imposed upon him; that he is especially well equipped and qualified to discharge all the duties of said position.

Fifth. Your orator would further show that the defendant A. B. White was duly appointed United States collector of internal revenue for the district of West Virginia, which appointment was duly confirmed by the Senate, and his commission was duly issued and signed, and he has qualified and taken charge of said office of collector as aforesaid, as provided by law.

Sixth. Your orator further shows that A. B. White, collector of internal revenue as aforesaid, has declared his intention to appoint a storekeeper to fill the place of your orator at the Hannis distillery, at Martinsburg, West Virginia, at an early date.

Seventh. Your orator would further show that he has been informed and believes that the defendants A. L. Hoult, John D. Sutton, and Anthony Staubly, all three residents of the district of West Virginia, have been reinstated or will be appointed and commissioned, and one of which will be assigned to duty in the place and in the stead of your said orators at the Hannis distillery, at Martinsburg, West Virgina, through the said A. B. White; that the said A. B. White, collector as aforesaid, has so declared his intentions of reinstating the defendants in the place and stead of your orators, and that such intention on his part, your orator has been informed and believe', has been openly made by him, and the public press of the country has so announced. A copy of the clipping of the Daily World, of Martinsburg, West Virginia, of September the 7th, is in the records of this honorable court and asked to be read as a part hereof, and taken from the State Journal, edited and controlled by the said White.

4 Eighth. Your orator, further complaining, says that he is a Democrat in politics, and was appointed as a Democrat to said office, and that he voted the Democratic ticket; that the defendant A. B. White is a Republican, and was as a Republican appointed to succeed E. M. Gilkeson, and that the said A. B. White has signified and declared his intention to remove from office or place in their stead the other three defendants as aforesaid because of the fact that your orator is in politics a Democrat, and for no other reason, and appoint and recommend in their stead Republicans, for no other reason that that they are Republicans in politics; and your orator is informed and believe' that said appointees so proposed by said White are not eligible to the position.

Ninth. Your orator, further complaining, says that his office as aforesaid is in the classified service and belongs to what is known as the "civil service," and as such *as* your orator can not be removed except for cause shown and proven. That Department No. 122 provides that "No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department or their appointing officers, of which the accused shall have full notice and opportunity to make defence." Said Department circular is issued and signed by the Hon. L. J. Gage, Sec. of the Treasury, and is filed herewith and ask' to be read as a part hereof. That in Department Circular No. 119, which is an Executive order, the same provisions are laid down, together with others, and signed by the Acting Commissioner of Internal Revenue and approved

by the Secretary of the Treasury, which said Executive order is herewith filed and asked to be read as a part of this bill.

Your orator further shows that he is one of the employees of the Treasury Department; that he is included in the classified service, and protected from removal for political or religious reasons under the
5 civil-service laws and rules of the United States, which will more fully appear by the following copy of a communications received from the Hon. Wm. C. Rice, acting president of the Civil Service Commission, of the date of September 10, 1897, filed and asked to be issued as a part hereof.

Tenth. Your orator, further complaining, says that if the said A. B. White be permitted to remove your orator from said office and position or supplant him by others that it will be illegal and in violation of law. That rule second, section third, of the civil-service rules reads as follows: "No person in the executive civil service shall dismiss or cause to be dismissed or make any attempt to procure the dismissal of or in any manner change the official rank or position of any other person therein because of his political or religious affiliations." Which provision your orator is informed and charge' is being violated and attempting so to be violated by all of said defendants. Section first of the civil-service rules: "Any person in the executive civil service of the United States who shall wilfully violate any of the provisions of the civil-service act or of these rules shall be dismissed from office."

Eleventh. Your orator further says that under the law he has a vested interest in said office, and that is the said A. B. White shall remove him therefrom, or assist in so doing, that it will be in violation not only of the civil-service rules, but of his vested interest in said office, for which he cannot have an adequate remedy at law, and therefore must appeal to the court of equity and ask its aid to enforce his rights, which have been guaranteed to him by act of Congress.

Twelfth. Your orator further shows that he is able, competent, and willing to discharge the duties of said office, and is unwilling to be summarily dismissed therefrom for no other reason than that he
6 is of the opposite politics of the said A. B. White, collector of internal revenue, as aforesaid.

Thirteenth. Your orator further shows that the said A. B. White, collector as aforesaid, has no power, right, or authority to remove your said orator from said office, or to appoint any other to take his place and thereby effect his removal, and that said defendants A. L. Hoult, John D. Sutton, and Anthony Staubly have no right or authority to take the oath of office and otherwise qualify and actually appear to take the position and thereby assist in the removal of your said orator, and as there are no vacancies created either by removals or resignations, and there being 15% now commissioned more than sufficient to perform the duties of storekeepers and gaugers in this district, and if they are permitted so to do, it will be in violation of law as well as in violation of the rights and vested interests of this complainant.

Fourteenth. Your orator further says that unless the said A. B. White be enjoined from removing your petitioner, as he is informed and believe' and so charge', he will so remove your complainant, and that unless A. L.

Hoult, John D. Sutton, and Anthony Staubley, or all of them, be enjoined from qualifying as officers of the United States to take the place of your orator's at the Hannis distillery, in the district aforesaid, they will in this manner effect the removal of this complainant from his office aforesaid, they having expressed their intention to accept said appointments and assignments.

Being therefore remediless save in your honorable court, the complainant therefore prays that an injunction be granted him restraining and prohibiting the said A. B. White, collector as aforesaid, and all others by and through him, from removing him from the position of
7 storekeeper until a vacancy is created according to law, as an officer of the United States aforesaid, and also from recommending, assigning, and appointing any person to the same position and from proceeding in the attempt to make such removal and in any other manner interfering with your complainant.

Your orator further prays that the said A. L. Hoult, John D. Sutton and Anthony Staubley and all other persons may be enjoined and restrained and prohibited from qualifying as storekeeper to take the place of your complainant as such officer at the Hannis distillery in Martinsburg, West Virginia, or in any other way aid or assist in the removal of your said orator or performing or discharging any of the duties of said office, and that all further and general relief may be granted your orator as to equity may seem just and right, and they will ever pray, etc.

And to this end, therefore, that the said A. B. White, A. L. Hoult, John D. Sutton, and Anthony Staubley may be made to make true and perfect answer to this bill.

Your orator further prays that process may be issued requiring the said defendant to appear on a day certain and make true, full and perfect answers to this bill, and that all other process, orders, etc., may be had an' entered herein, and they will ever pray, etc.

J. G. RUCKMAN.

FAULKNER & WALKER & G. W. JOHNSON,
Attys. for Plff's.

UNITED STATES OF AMERICA,
District of West Virginia, ss:

This day personally appeared before the undersigned authority, whose name is signed to the foregoing bill, and, being by him first duly sworn, upon his oath states, that he has read said bill and knows the contents thereof, and that the allegations therein contained are true.

8 Except so far as they are therein stated to be upon information and belief, and so far as they are therein stated to be upon information and belief, he believes them to be true.

Taken, sworn, and subscribed before me this 30th day of September, 1897.

[NOTARIAL SEAL.] GEO. W. JOHNSON,
Notary Public for the Co. of Berkeley & State of W. Va.

PROVIDING FOR THE ENFORCEMENT OF THE PROVISIONS OF EXECUTIVE ORDER OF JULY 27, 1897, AS TO REMOVAL FROM THE CLASSIFIED SERVICE.

1897.
Department Circular No. 122.
Division of Appointments.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, D. C., August 11, 1897.

The attention of supervising officers and agents of this Department is called to so much of Executive order of July 27, 1897, as is amendatory of Civil Service Rule II, and provides as follows:

"No removal shall be made from any position subject to competitive examination except for just cause and upon written charges filed with the head of the Department or other appointing officer and of which the accused shall have full notice and an opportunity to make defense."

In view of the foregoing, whenever any officer, agent, clerk, or employee in the service of this Department shall appear to the officer or agent charged with the supervision of his official conduct to be guilty of such dereliction of duty, delinquency, or misconduct, or shall prove inefficient to such an extent as to seem to justify the removal of such person from the service or his reduction in grade, it shall be the duty of such supervising officer to immediately forward to this office written charges and specifications, detailing fully and explicitly the reasons for removal or reduction.

At the same time a complete copy of the charges and specifications will be furnished to the accused, with the information that such defense as is desired to be made in the premises must be submitted to the supervising officer, for transmission to this office, within three days from date of receipt of the copy of the written charges.

Whenever it is impracticable to present a copy of the charges to the accused in person, it will be sent by registered mail and the receipt carefully preserved.

10 The fact that the accused has been thus furnished with a complete copy of the charges and informed of the opportunity to make defense, as above set forth, will be reported to this office at the same time that the written copy of charges is forwarded to the accused, as aforesaid.

In the event that the accused fails to mail his written defense to the supervising officer within the time above specified, it will be assumed that such person does not desire to embrace the opportunity thus afforded.

The written defense will be delivered in person when practicable, otherwise it should be forwarded to the supervising officer by registered mail, and, after due examination, immediately transmitted to this office, accompanied by a letter of the supervising officer submitting his views in the matter of the defense, and making such recommendation as the circumstances and the nature of the defense may seem to warrant.

When the circumstances are such as to render it evident that the interests of the service will be better subserved by immediately relieving the accused from duty, pending action on the charges, that course will be pursued, in which case the action taken will be promptly reported to this office.

Supervising officers will furnish each officer, agent, clerk, or employee within their respective jurisdictions with a copy of this circular and enforce strict compliance with its provisions.

L. J. GAGE, *Secretary.*

(Endorsed:) Filed in open court Oct. 1, 1897. L. B. Dellicker, clerk.

11 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Restraining order.—Entered September 29, 1897.

J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

For the district of West Virginia.

This cause came on this 29th day of September, 1897, upon the complaint of J. G. Ruckman in the above-entitled cause, who presented to the court his bill, praying, among other things, that an injunction be granted restraining and inhibiting the defendant A. B. White, U. S. collector of internal revenue for the district of West Virginia, from recommending the appointment of A. L. Hoult, Jno. D. Sutton, Anthony Staubley, or any other person, by or through him or them, from removing him from the position of storekeeper at the Hannis distillery, in the district of West Virginia, until vacancies are created according to law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any way interfere with the complainant, J. G. Ruckman, in his said office.

And further, that A. L. Hoult, John D. Sutton, Anthony Staubley, and all other persons, be restrained and enjoined from qualifying as storekeeper to take the place and position of the said Ruckman at the said distillery, in the said district, or in discharging any of the duties of said officer, Ruckman; and the bill having been inspected and seen by the court, it is ordered to be filed.

And thereupon the complainant, Ruckman, moved for a tem-
12 porary restraining order, pending said application and motion for an injunction, in accordance with the prayers of his bill, upon consideration whereof the court is of opinion to and doth allow said temporary order.

Whereupon it is adjudged, ordered, and decreed that A. B. White, U. S. collector of internal revenue for the district of West Virginia, be, and is hereby, restrained, enjoined, and inhibited from recommending, appointing, or aiding in the appointment of A. L. Hoult, John D. Sutton, Anthony Staubley, or any other person to said position, and from removing the said complainant, Ruckman, aforesaid, until a vacancy therein is created by law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfere with the said complainant, Ruckman, in the said office, as aforesaid.

It is further adjudged, ordered, and decreed that A. L. Hoult, John D. Sutton, Anthony Stroubley and all others persons be, and they are hereby, enjoined and prohibited from acting as storekeeper in *in* the place and stead of the said complainant, Ruckman, as aforesaid, or in discharging any of the duties of said office, until the further order of this court.

And it is further ordered by the court that the service of a copy of this order shall be sufficient service of the notice of the application for an injunction, which is set down for a hearing before the court sitting at Clarksburg on Wednesday, the 6th day of October, 1897, and J. C. McMahon is hereby designated to serve this injunction.

13 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order, process and return.—Entered Sept. 29, 1897.

J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL.
For the district of West Virginia. } In equity.

Served on J. D. Sutton Oct. 5, 1897. Served on A. B. White Oct. 6, 1897. Returned and filed Oct. 19, 1897.

This cause came on this 29th day of September, 1897, upon the complaint of J. G. Ruckman in the above-entitled cause, who presented to the court his bill, praying, among other things, that an injunction be granted, restraining and inhibiting the defendant A. B. White, U. S. collector of internal revenue for the district of West Virginia, from recommending the appointment of A. L. Hoult, Jno. D. Sutton, Anthony Staubley, or any other person, by or through him or them, from removing him from the position of storekeeper at the Hannis distillery, in the district of West Virginia, until vacancies are created according to law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal and in any way interfere with the complainant, J. G. Ruckman, in his said office.

And further, that A. L. Hoult, John D. Sutton, Anthony Staubley and all other persons be restrained and enjoined from qualifying as storekeeper to take the place and position of the said Ruckman at the said distillery in said district, or in discharging any of the duties of said officer, Ruckman; and the bill having been inspected and seen by the court, it is ordered to be filed.

And thereupon the complainant, Ruckman, moved for a temporary restraining order, pending said application and motion for an injunction, in accordance with the prayers of his bill, upon consideration whereof the court is of opinion to and doth allow said temporary order.

Whereupon it is adjudged, ordered, and decreed that A. B. White, U. S. collector of internal revenue for the district of West Virginia, be,
14 and is hereby, restrained, enjoined, and inhibited from recommending, appointing, or aiding in the appointment of A. L. Hoult,

John D. Sutton, Anthony Stroubley or any other person to said position, and from removing the said complainant, Ruckman, aforesaid, until a vacancy therein is created by law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfere with the said complainant, Ruckman, in the said office, as aforesaid.

It is further adjudged, ordered, and decreed that A. L. Hoult, John D. Sutton, Anthony Stroubley, and all other persons be, and they are hereby, enjoined and prohibited from acting as storekeeper in *in* the place and stead of the said complainant, Ruckman, as aforesaid, or in discharging any of the duties of said office, until the further order of this court.

And it is further ordered by the court that the service of a copy of this order shall be sufficient service of the notice of the application for an injunction, which is set down for a hearing before the court, sitting at Clarksburg on Wednesday, the 6th day of October, 1897, and J. C. McMahon is hereby designated to serve this injunction.

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do hereby certify that the foregoing is a true copy of an order entered of record in the cause of J. G. Ruckman vs. A. B. White, collector, et al., on the 29th day of September, 1897.

In testimony whereof I have hereunto set my hand and the seal of said court this 1st day of October, 1897.

L. B. DELLICKER, *Clerk.*

(Endorsed:) Served the within-named order on the within-named John D. Sutton by delivering to him in person an office copy
15 thereof on the 5th day of Oct., 1897, and on A. B. White by delivering to him in person an office copy hereof on the 6th day of Oct., 1897.

J. C. MCMAHON.

Filed Oct. 19, 1897. L. B. Dellicker, clerk.

16 J. G. RUCKMAN *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

Restraining order.—Entered October 1, 1897.

J. G. RUCKMAN *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

This cause came on to be heard this 1st day of October, 1897, upon the complaint of J. G. Ruckman in the above-entitled cause, who presented his bill to the court, praying, among other things, that an injunction be granted restraining and inhibiting the defendant A. B. White, U. S. collector of internal revenue for the district of West Virginia, from recommending the appointment of A. L. Hoult, John D. Sutton, and Anthony Staubley and Frank T. Thayer, and any other person by or through him, from removing him from the position of storekeeper at the Hannis distillery, in this district of West Virginia, until vacancies are created according to law, and from assigning and appointing any

person to the same position, and from proceeding in the attempt to make such removal, and in any manner interfere with the complainant, J. G. Ruckman, in his said office.

And, further, that A. L. Hoult, John D. Sutton, Anthony Staubley, and Frank T. Thayer be restrained and enjoined from qualifying as storekeeper to take the place and position of the said Ruckman at the said distillery in the said district, or in discharging any of the duties of said officer, Ruckman; and the bill having been inspected and seen by the court, it is ordered to be filed.

And thereupon the complainant, J. G. Ruckman, moved for a temporary restraining order pending said application and motion for an injunction, in accordance with the prayers of this bill; upon con-
17 sideration whereof the court is of the opinion to and doth allow said temporary order.

Whereupon it is adjudged, ordered, and decreed that A. B. White, U. S. collector of internal revenue for the district of West Virginia, be, and he is hereby, restrained, enjoined, and inhibited from recommending, appointing, or assisting in the appointment of A. L. Hoult, John D. Sutton, Anthony Staubley, and Frank T. Thayer, or any other person, to said position, and from removing the said complainant, Ruckman, as aforesaid, until a vacancy therein is created by law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfere with said complainant, Ruckman, in his said office, as aforesaid.

It is further adjudged, ordered, and decreed that A. L. Hoult, John D. Sutton, Anthony Staubley, Frank T. Thayer, and all other persons be, and they are hereby, restrained and prohibited from acting as storekeeper in the place and stead of the said complainant, Ruckman, as aforesaid, or in discharging any of the duties of said office until the further order of this court.

And it is further ordered by the court that a service of a copy of this order shall be sufficient service of the notice of the application for an injunction, is set down for a hearing before the court, sitting at Clarksburg, on Wednesday, the 6th of October, 1897, and J. C. McMahon is hereby designated to serve this injunction.

Enter.

JACKSON, *Judge.*

OCT. 1, '97.

18 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Process & marshal's return.—Entered October 1, 1897.

J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL.

For the district of West Virginia.

This cause came on to be heard this 1st day of Oct., 1897, upon the complaint of J. G. Ruckman, in the above-entitled cause, who presented to the court his bill, praying, among other things, that an injunction be

granted restraining and inhibiting the defendant A. B. White, U. S. collector of internal revenue for the district of West Virginia, from recommending the appointment of A. L. Hoult, John D. Sutton, Anthony Staubley, and Frank T. Thayer, and any other person by or through him, from removing him from the position of storekeeper at the Hannis distillery, in this district of West Virginia, until vacancies are created according to law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any manner interfere with the complainant, J. G. Ruckman, in his said office.

And, further, that A. L. Hoult, John D. Sutton, Anthony Staubley, and Frank T. Thayer be restrained and enjoined from qualifying as storekeeper to take the place and position of the said Ruckman at the said distillery, in the said district, or in discharging any of the duties of said officer, Ruckman; and the bill having been inspected and seen by the court, it is ordered to be filed.

And thereupon the complainant, J. G. Ruckman, moved for a temporary restraining order pending said application and motion for an injunction, in accordance with the prayers of this bill, upon consideration whereof the court is of the opinion to and doth allow said temporary order.

Whereupon it is adjudged, ordered, and decreed that A. B.
19 White, U. S. collector of internal revenue for the district of West Virginia, be, and he is hereby, restrained, enjoined, and inhibited from recommending, appointing, or assisting in the appointment of A. L. Hoult, John D. Sutton, Anthony Staubley, and Frank T. Thayer, or any other person, to said position, and from removing the said complainant, Ruckman, as aforesaid, until a vacancy therein is created by law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfer' with the said complainant, Ruckman, in the said office as aforesaid.

It is further adjudged, ordered, and decreed that A. L. Hoult, John D. Sutton, Anthony Staubley, Frank T. Thayer, and all other persons, be, and they are hereby, enjoined and prohibited from acting as storekeeper in the place and stead of the said complainant, Ruckman, as aforesaid, or in discharging any of the duties of said office, until the further order of this court.

And it is further ordered by the court that a service of a copy of this order shall be sufficient service of the notice of the application for an injunction is set down for a hearing before the court, sitting at Clarksburg, on Wednesday, the 6th of October, 1897; and J. C. McMahon is hereby designated to serve this injunction.

Enter. JACKSON, *Judge.*

OCT. 1, '97.

(Endorsed:) Served the within order by delivering a true copy thereof to John D. Sutton, in Martinsburg, in the State of West Virginia, on October 1st, 1897.

J. C. MCMAHON.

Subscribed and sworn to before me this 4th day of October,
20 1897.

L. B. DELLICKER, *Clerk.*

21 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order removing cause to Martinsburg, and giving leave to amend bill if amendment be deemed necessary.—Entered October 6, 1897.

J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

This cause having been set for hearing this 6th day of October, 1897, upon the motion of the complainant for an injunction to be made absolute, restraining and inhibiting the defendant White, and other defendants named in the bill, and all other persons, from removing the complainant or revoking his assignment as storekeeper at the Hannis distillery, in the district of West Virginia, or in any way interfering with him in his said position as storekeeper, and the defendants not being fully advised at this time as to the defence they desire to make, it is ordered that this cause be set down for hearing on the 18th day of October, 1897, at Martinsburg, and the preliminary injunction heretofore awarded in this cause be continued until the further order of this court; and in the meantime the defendants are required to file any and all pleadings on or before the 9th day of October, 1897, it being agreed by counsel that, if the defendants wish to do so, they may file both demurrer and answer at the same time, and leave is given to the complainant to join in the demurrer and to file exceptions to the answer, or take issue thereon, as he may elect.

And it is further ordered that in the event the answer discloses such a state of facts as to render it necessary for him to amend his bill, then the further leave is given him to file, on or before the 14th of October, 1897, his amended bill, and each side is allowed until the 18th to file affidavits in support of their respective rights.

Enter.

JACKSON, *Judge*.

OCT. 6, '97.

22 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Answer of defts.—Filed October 8, 1897.

In the circuit court of the United States for the district of West Virginia.

J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR OF INTERNAL REVENUE FOR the district of West Virginia, A. L. Hoult, John D. Sutton, & Anthony Staubley. } In equity.

The answer of the above-named defendants, A. B. White, John D. Sutton, and Anthony Staubley, to the bill of complaint of the above-named plaintiff.

For answer to said bill the defendants say as follows:

1. They are advised, and believe that it is true, that the plaintiff was commissioned by the Secretary of the Treasury of the United States a

storekeeper in 1893; but they say it is not true that he has been assigned to duty at the Hannis distillery, at Martinsburg, West Virginia, all the time since his appointment. That it is, and has for a long time been, the policy of the Internal Revenue Bureau to rotate the assignments of storekeepers and gaugers, for the purpose of securing to each of such gaugers and storekeepers a fair proportion of employment, and for the purpose of preventing collusion between the gaugers and storekeepers and distillery officials, and otherwise protecting the interests of the Government. And under the policy aforesaid the plaintiff has been repeatedly assigned to and relieved from assignment to duty at said Hannis distillery. That he was on duty at said Hannis distillery during the month of September, 1897, and the time arrived at the end of September, 1897, when it was deemed by the Commissioner of Internal Revenue fair and right among the several storekeepers and for the best interests of the public service to transfer plaintiff from duty at said distillery as head or "day" storekeeper to "additional" store-

23 keeper, at the same pay. That theretofore for several months William Butler had been doing duty at said Hannis distillery under assignment by the Commissioner of Internal Revenue as "additional" storekeeper. And thereupon an order was made by the Commissioner of Internal Revenue, on September 30, 1897, relieving said Butler from duty as additional storekeeper at the said Hannis distillery, which said order was on the same day telegraphed to said Butler. And on the said 30th day of September an order was made by the Commissioner of Internal Revenue assigning the plaintiff, Ruckman, to duty at the said distillery in place of said Butler, which said order was, on the same day, mailed to said Ruckman. And the defendant A. B. White, collector, &c., on the first day of October, 1897, by authority and direction of the Commissioner of Internal Revenue, notified said Ruckman of his assignment to duty in the place of plaintiff, and at the time of said notification of said Ruckman the said A. B. White, collector, &c., found said Ruckman in the warehouse of said distillery, performing the duties from which said Butler had been relieved. That the said Ruckman was appointed a storekeeper about the year 1893, and that he was on duty at said distillery as storekeeper during the month of September, 1897, as "head" or "day" storekeeper; and that the order of the Commissioner of Internal Revenue in relation to him, hereinbefore referred to, simply had the effect of relieving him as "head" storekeeper, and assigning him to duty as "additional" storekeeper, in the place of William Butler, relieved, and at the same rate of compensation. And defendants further say that the compensation of "additional" storekeeper being the same as that of "day" storekeeper, and the duties being lighter, that the said transfer was not a wrong or injury to plaintiff, and that he cannot complain thereof in this suit.

2. Defendants are not advised, and therefore neither admit nor

24 deny, that the plaintiff was appointed upon the recommendation of the late collector, E. M. Gilkeson.

3. The defendants admit that the plaintiff is an officer of the United States, duly appointed and commissioned, and has, so far as defendants know, executed bond as required by law; and that the compensation of a storekeeper of his class is four dollars per day for such time as he shall be officially employed according to law. And the defendants further

admit that the plaintiff does not hold his position "at the discretion or upon the sufferance of the collector of internal revenue." And the defendants say that the collector of internal revenue has not attempted to exercise such authority.

4. Defendant White says that plaintiff has been on duty only one month since said White has been collector, and that he is not fully advised as to plaintiff's competency.

5. The defendants admit that the said A. B. White has been duly appointed and commissioned collector of internal revenue and has qualified and taken charge of said office.

6. The defendants say that the defendant A. B. White, as collector of internal revenue, has never declared his intention to appoint the plaintiff or any one else a storekeeper or gauger, knowing full well and recognizing the fact that storekeepers and gaugers are and can only be appointed by the Secretary of the Treasury.

7. The defendants say that the defendant Hoult was reinstated by the Secretary of the Treasury July 9th, 1897, as a gauger, in accordance with the laws of the United States and in accordance with the civil-service law, having first been certified as eligible to such reinstatement by the Civil Service Commission. And that the said John D. Sutton was also reinstated August 16th, 1897, by the Secretary of the Treas-
25 ury, as a storekeeper, in accordance with the civil-service law, having first been certified as eligible by the Civil Service Commission. And that the defendant Anthony Staubley was, on the ,day of August, 1897, reinstated as a storekeeper by the Secretary of the Treasury, in accordance with the civil-service law, having first been certified as eligible to such reinstatement by the Civil Service Commission. That the said Hoult, Sutton, and Staubley had all been duly commissioned, and had executed bonds and qualified prior to the institution of this suit. The defendant White denies that he has ever declared his intention to reinstate any of said officers or to assign them to duty in the place of the plaintiff, recognizing fully that he had no such authority. And defendants further say that neither the defendant Hoult nor the defendant Staubley has been assigned to duty since his reinstatement.

8. The defendant White admits that he is a Republican in politics and the defendants admit that the plaintiff is a Democrat in politics. The defendant White denies that he ever signified or declared his intention to remove the plaintiff from office, or place the defendants or any one else in his place, for the reason that the plaintiff was a Democrat in politics, and for no other reason to appoint or recommend in his stead a Republican. The defendant White says that in fact and in law he could have nothing to do with the removal or appointment of a storekeeper or a gauger unless it be to recommend the same; that, in short, the appointment of storekeepers and gaugers and their removals can be made only by the Secretary of the Treasury. The defendants furthermore say that the assignment complained of by the plaintiff was made by the Commissioner of Internal Revenue, whom the defendants understand is a Democrat.

9. The defendants admit that the office of storekeeper held by the
26 plaintiff is in the classified service, "and belongs to what is known as the civil service." And the defendants expressly charge that,

so far as they know, the plaintiff has not been removed, but, on the contrary, still holds the position of United States storekeeper. The defendants insist that the fact that the plaintiff has been transferred from "day" storekeeper to "additional" storekeeper at the same pay is not a removal from office; that he may be assigned to duty or transferred or nonassigned at any time by the Commissioner of Internal Revenue. The defendants further insist that the plaintiff can not in this manner question the right of the Commissioner of Internal Revenue to assign or transfer a United States storekeeper at a distillery or relieve one who has already been assigned. The defendants further insist that the Commissioner of Internal Revenue alone has the right to assign to duty a United States storekeeper and to determine how long he shall remain on duty under such assignment; and that no law, Executive order, or rule or regulation of the Civil Service Commission is violated by the Commissioner of Internal Revenue doing as he has done in this case in exercising the authority conferred upon him by the acts of Congress by assigning a storekeeper to duty at the said distillery and transferring to other duties, who had been theretofore assigned to duty at the same distillery by the same Commissioner and by the same acts of Congress. And defendants further say that no act of Congress, Executive order, or rule or regulation of the Civil Service Commission is violated by the collector of internal revenue who, in accordance with the rules and regulations of the Internal Revenue Bureau, recommends for assignment or transfer of assignment a storekeeper duly appointed by the Secretary of the Treasury, and who has executed bond and qualified as such.

10. The defendants deny that there is any attempt on the part of the said White to remove the plaintiff from office; that, as herein-
27 before stated, he claims no such right or power.

11. The defendants, further answering, say that the defendants are not attempting by themselves or to assist anyone else to violate any law or civil-service rule or regulation.

12. The defendants further say that no doubt the plaintiff would be willing to continue in office; but the defendant White says that if any attempt shall be made to remove or dismiss the plaintiff from the service, it will not be made "for no other reason than that" he is "of opposite politics to the said A. B. White, collector of internal revenue."

13. Replying to allegation No. 13 in plaintiff's bill, the defendants again say that the defendant White claims no right or authority to remove the said plaintiff from office or to appoint anyone in his place, and that he never has claimed any such authority. The defendants say that the defendants Hoult, Sutton, and Staubley, having been duly appointed to the positions respectively held by each of them by the Secretary of the Treasury, that the right to hold said positions can not be questioned in this or any other collateral proceeding. That the question of whether there were or not vacancies at the time these appointments were made can not be determined in this suit. Neither of said defendants Hoult, Sutton, or Staubley was appointed in the place of the plaintiff; the appointment of neither could affect the plaintiff, and whether the Secretary of the Treasury has more of these officers in commission than he is entitled to have under the law, is not a ques-

tion which can be raised by the plaintiff in this suit. It can not be ascertained in this proceeding whether or not 15 per centum or any other number of officers are now in commission more than are sufficient to perform the duties of storekeepers and gaugers in this collection district.

This court, it is respectfully suggested, will not undertake to
28 ascertain the number of distilleries in operation, and to be placed in operation, in said collection district, and the number of storekeepers and gaugers to be placed on duty at such distilleries. It is submitted that these are questions to be determined by the Treasury Department, and must be supposed to have been determined before such appointments were made, and the appointments made in conformity to the interests and requirements of the public service. Defendants therefore deny that by the appointment of the defendants Hoult, Sutton, and Staubley more storekeepers and gaugers were placed in commission than were sufficient to perform the duties of such offices in said district.

14. The defendants deny that the appointment and qualification of the said Hoult, Sutton, and Staubley will make necessary the removal of the plaintiff. The defendants, further answering, say that the defendant Hoult was, on the day of , 1889, appointed a U. S. gauger; that on the day of , 1893, after having served about four years, and there having been a change of Administration, he was removed from said position through no delinquency or misconduct of his; that during the late war of the rebellion he served in the military service of the United States, and was honorably discharged therefrom; that, availing himself of the provision of Rule IX of the civil-service regulations, he made application to the Secretary of the Treasury to be reinstated to the position from which he had been removed; that the defendants are informed that said petition, together with the requisition of the proper officer of the Treasury Department, were referred to the Civil Service Commission, and, his eligibility having been properly certified by said Commission, he was reinstated and reappointed by the Secretary of the Treasury. Said petition was originally filed with E. M. Gilkeson, late collector of internal revenue, and, together with the recommendation of said collector, forwarded to the Commissioner of Internal Rev-
29 enue. The defendants insist that in making said appointment or reinstatement the Secretary of the Treasury acted in strict conformity with the acts of Congress and the rules and regulations of the Civil Service Commission. The defendants Sutton and Staudley were similarly reinstated and reappointed as storekeepers.

The defendant A. B. White says that the recommendation made by him to the Commissioner of Internal Revenue relative to the plaintiff was made prior to the 29th day of September, 1897, and the said recommendation was made in part because the said plaintiff had been on duty for some time, and not at all for political reasons. Said defendants further say that they believe and charge that the reinstatement and appointment of said defendants Hoult, Sutton, and Staubley were not made by the Secretary of the Treasury for political reasons, nor was the plaintiff transferred, as aforesaid, at the Hannis distillery by the Commissioner of Internal Revenue for political reasons, or heretofore assigned to duty at said distillery for political reasons.

And, having fully answered, defendants ask to be hence dismissed with their costs. And, as in duty bound, they will ever pray, etc.

A. B. WHITE,
Collector of Internal Revenue, District of West Virginia.
A. L. HOULT,
JOHN D. SUTTON, and
ANTHONY STAUBLY.

JOHN W. MASON,
JOSEPH H. GAINES, *U. S. Attorney,*
For Defts.

STATE OF WEST VIRGINIA,
County of Harrison, to wit:

A. B. White, one of the defendants named in the foregoing
30 answer, being first duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information, and so far as they are therein stated to be upon information he believes them to be true.

A. B. WHITE.

Taken, subscribed, and sworn to before me this day of October, 1897.
L. B. DELLICKER, *Clerk.*

STATE OF WEST VIRGINIA,
County of Berkeley, to wit:

John D. Sutton, one of the defendants named in the foregoing answer, being first duly sworn, says that the facts and allegations therein contained are true, except so far as they are therein stated to be upon information, and so far as they are therein stated to be upon information he believes them to be true.

JOHN D. SUTTON.

Taken, subscribed, and sworn to before me this 19th day of October, 1897.
U. S. G. PITZER,
Notary Public.

(Endorsed:) Circuit court U. S., dist. W. Va. Filed in office this 8th day of October, 1897. L. B. Dellicker, clerk.

31 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Certification by Secretary of the Treasury of following letters.—Dated October 16, 1897.

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT,
October 16, 1897.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed papers are true and correct copies of the originals as appears from the records in this Department.

In witness whereof I have hereunto set my hand and caused the seal of the Treasury Department to be affixed on the day and year first above written.

[SEAL.]

L. J. GAGE,
Secretary of the Treasury.

S. J. S. M. G.

(Endorsed:) Filed October 19th, 1897. L. B. Dellicker, clerk.

32

INTERNAL REVENUE SERVICE,
DISTRICT OF WEST VIRGINIA,
DEPUTY COLLECTOR'S OFFICE,
Martinsburg, W. Va., 5–19, 1897.

COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C.

MY DEAR SIR: You will see by the collector's letter of April 28th that according to the plan of rotation used with the force at the Hannis distillery I would be reassigned to duty June 1st. You will also notice that he says that he has decided not to make any more changes after those made May 1st. In his letter of May 8th he gives his reasons, which I think do me an injustice. I feel that I am perfectly competent, and that I have faithfully discharged my duties.

I am perfectly willing to loose my proportion of the time. Please return the enclosed letters.

Hoping that you will have me reassigned to duty June 1st, I am,
Yours, respectfully,

WM. BUTLER.

33 T. A. C. E. C. J.
S. L. S. & T. E. K.
In correspondence on this subject quote the above initials.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., May 22, 1897.

E. M. GILKESON, Esq.,
Collector Internal Revenue, Parkersburg, West Virginia.

SIR: This office is in receipt of a letter from Storekeeper Wm. Butler, of your district, under date of the 19th instant, enclosing one from you addressed him under date of the 28th ultimo, in which you inform him that "according to the plan of rotation heretofore used with the force at this distillery (the Hannis Distilling Co.), you (he) would be reassigned June 1st," but that you "have decided, however, not to make any more changes after those made for the 1st of May during my (your) incumbency as collector unless that should be extended longer than I (you) now anticipate."

You are informed that upon an examination of the records it appears that operations were suspended at the Hannis Distilling Co. on December 19, 1896, and that since that date Storekeeper Butler has been off duty during the month of February and will have been off duty during the present month; also that Storekeeper League has been off duty during a portion of the month of December, 1896, and during the entire months

of January and April, 1897, whereas it appears that Storekeeper Ruckman has been off duty during the month of March only.

It is the intention of this office that, all things being equal, each officer shall receive his due proportion of assignment to duty, and to that end you are hereby directed to recommend the assignment of Storekeeper Butler to duty, to take effect the first proximo, unless there are good
34 and sufficient reasons known to you why such assignment should not be made, in which case you will make full report of the facts to this office.

Respectfully, yours,

G. W. WILSON,
Acting Commissioner.

35 INTERNAL REVENUE SERVICE,
DISTRICT OF WEST VIRGINIA,
COLLECTOR'S OFFICE,
Parkersburg, W. Va., May 24, 1897.

Hon. W. S. FORMAN,
Commissioner Internal Revenue, Washington, D. C.

SIR: Replying to the letter of the Hon. Acting Commissioner of the 22nd instant (T. A. C., S. L. S., T. E. K.) in regard to the letter, dated 19th instant, from Storekeeper Wm. Butler, of this district, addressed to you, wherein he complains of my decision not to recommend him for reassignment to the warehouse of the Hannis Distilling Company the first proximo, I have the honor to report as follows:

You call attention to the fact that your records show that since December 19, 1896, the date of the last suspension at the Hannis Distilling Company, Storekeeper Butler has been off duty during the month of February and the present month; that Storekeeper League has been off duty during a portion of December, 1896, and the months of January and April, 1897, while Storekeeper Ruckman has been off duty during the month of March only.

If you will examine the records of your office during all the suspensions at this distillery since I became collector of internal revenue for this district, you will find that, in so far as the dates of suspension and resumption would permit, the time lost by officers at this distillery has been fairly apportioned among them. But for the circumstances which controlled my decision in this matter Storekeeper Ruckman would have been relieved the 1st proximo and Storekeeper Butler reassigned. In addition to my official letter to Storekeeper Butler of the 28th ultimo announcing my decision in the matter, I wrote him a frank per-
36 sonal letter fully explaining my reasons therefor.

You will notice from your records that Mr. Ruckman and Mr. League have both been assigned to duty as day storekeepers, while Mr. Butler has never had an assignment other than additional storekeeper. His duties have not been above the rank of a guard or watchman. He is not competent to fill the position of storekeeper in charge. My four-year term of office expires June 30th, 1897, at which time I expect this office to be transferred to my successor, when appointed. As only two officers can be on duty at the Hannis Distillery during suspension, I naturally desired that these two should be the best, so that in case of the

sickness or unavoidable absence of either the other could immediately take charge of the records, *ect.*, *ect.* I am particularly anxious that Mr. Ruckman should be on duty when transfer of office is to be made, because he is unquestionably the best officer of the three. My successor must, as you know, receipt for all the spirits in bond. It is therefore important for me and for him to know that I have taken every precaution to secure correct records at that distillery, the only one of considerable size in the district.

My action in the matter is not intended to prejudice Mr. Butler with my successor. If he should be retained his due proportion can easily be arranged after July 1st, as the distillery will not resume before September, if then.

I trust my course in the matter will meet with your approval. I should regret very much to be forced to change my decision now, as I cannot but believe that under the circumstances it would severely interfere with the proper discipline of the force at that distillery, and might be a source of much embarrassment at a time when I am particularly anxious that everything in the district should be in the best possible condition.

Respectfully, yours,

E. M. GILKESON, *Collector.*

37
T. A. C.
S. L. S. & T. E. K.
In correspondence on this subject quote the above initials.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., May 26, 1897.

E. M. GILKESON, Esq.,
Collector of Internal Revenue, Parkersburg, West Virginia.

SIR: Your letter of the 24th instant has been received relative to the assignment to duty at the distillery of the Hannis Distilling Co., of your district, of Storekeeper Wm. Butler, for day service, vice J. G. Ruckman. You state therein that Storekeeper Butler has never been assigned for day service to this distillery; that his duties have not been above the rank of a guard or watchman, and that he is not competent to fill the duties of storekeeper-in-charge.

In answer, you are informed that the records of this office show that during the month of August, 1895, Mr. Butler was assigned to the Hannis Distilling Co. in the capacity of day storekeeper, and that the daily returns, Form 86, and monthly return, Form 87, received from him were satisfactory in every respect, and none were required to be returned for correction or for explanation; in fact, they compare favorably with the reports received from the majority of the officers of this class.

The office is therefore still of the opinion that this officer should receive his due proportion of service, and to that end has this day assigned him to duty for day service at the Hannis Distilling Co., to take effect the first proximo, vice Storekeeper J. G. Ruckman.

Respectfully, yours,

G. W. WILSON,
Acting Commissioner.

38 INTERNAL REVENUE SERVICE,
DISTRICT OF WEST VIRGINIA,
COLLECTOR'S OFFICE,
Parkersburg, W. Va., May 28, 1897.

Hon. W. S. FORMAN,
Commissioner of Internal Revenue, Washington, D. C.

SIR: Replying to the letter of the Hon. Acting Commissioner of the 26th instant (T. A. C., S. L. S., T. E. K.), relative to the assignment to duty at the distillery of the Hannis Distilling Company, of this district, of Storekeeper Wm. Butler for day service vice J. G. Ruckman, I beg to say that while I was in error in my letter of the 24th instant in saying that Mr. Butler had never been assigned to duty as day storekeeper, I was not in error in stating that his duties performed had never been above the grade of a guard or watchman, and that he was not competent to discharge the duties of day storekeeper.

In making the statement that Mr. Butler had never been assigned as day storekeeper I was speaking from memory and overlooked at the time that he had been so assigned in August, 1895. Mr. Butler has not since requested to be assigned as day storekeeper, and only requests now to be assigned as additional storekeeper.

You refer to the reports on Forms 86 and 87 for the month of August, 1895, and say they compare favorably with the reports received from the majority of the officers of this class. There were twelve withdrawals at the Hannis Distilling Company reported on Form 86 for August, 1895. According to the records of this office, Form 86 for August 1, 1895, was prepared and signed by Storekeeper J. W. League. This was prob-
39 ably due to the fact that his revocation as day storekeeper was delayed and had not reached him on that date. On August 12th, 13th, and 15th, Forms 86 were prepared by Storekeeper League, who was at the distillery, but not assigned. On August 10th, 19th, 21st, 22nd, 24th, 26th, 28th, and 31st, Forms 86 were prepared by J. G. Ruckman, who was assigned to duty for that month as additional storekeeper. Form 87, for August, 1895, was made out by Storekeeper Ruckman. These statements can readily be verified by comparing the returns for August, 1895, with the reports for other months rendered by Storekeepers Ruckman and League. I have, however, taken the precaution to ascertain beyond a doubt that the reports for that month were, at the personal request of Storekeeper Butler, made out as above indicated. Mr. Butler was day storekeeper in name only. He prooved at that time the truth of my statement that he is not competent to fill the position.

Mr. Butler with the assistance of Storekeeper League could nominally fill the position of day storekeeper, but should Mr. League become sick, or for any personal reason refuse the assistance, there would be immediate confusion. I can not think that such an unsatisfactory arrangement would meet your approval, and for that reason I respectfully submit the above and await your further instructions.

Very respectfully,

E. M. GILKESON, *Collector.*

40 T. A. C. E. C. J.
S. L. S. T. E. K.
In correspondence on this subject quote the above initials.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REV'UE,
Washington, D. C., May 29, 1897.

[Telegram.]

Collector GILKESON,
Parkersburg, West Virginia:

Storekeeper Ruckman may be continued on duty at Hannis distillery, with understanding that Butler will be assigned thereto on July first.

G. W. WILSON,
Acting Commissioner.

Official business. Government rates. Charge Treasury Department.

41 Office Form No. 24, Ed. 4 24 96 1,500. G. W. W.

ASSIGNMENT OF U. S. STOREKEEPER.

T. A. C.
T. L. S. A. B. H.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., Sept. 30, 1897.

J. D. SUTTON, Esq.,
U. S. Storekeeper, Parkersburg, West Va.

SIR: Having been duly appointed and qualified as internal-revenue storekeeper, you are hereby assigned for day service to the distillery warehouse of Hannis Dis. Co. # 1, in the district of W. Va., under the direction of the collector, to take effect Oct. 1, 1897.

Your compensation will be four dollars per day for such time as you shall be actually employed.

The statute prohibits your being engaged in any other business while in the service of the United States without a written permission from this office.

Respectfully, yours,

W. S. FORMAN,
Commissioner.

42 T. A. C. G. W. W.
S. L. S. & T. E. K.
In correspondence on this subject quote the above initials.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., September 30, 1897.

[Telegram.]

JOHN D. SUTTON,
U. S. Storekeeper, Sutton, Braxton Co., West Virginia:

You are hereby assigned for day service to Hannis Distilling Company, vice Ruckman, assigned for additional service. Effective to-morrow morning.

W. S. FORMAN,
Commissioner.

Official business. Government rates. Charge Treasury Department.

43 Office Form No. 139. G. W. W.
Ed. 4 24 000.

TRANSFER OF U. S. STOREKEEPER.

T. A. C.
S. L. S. A. B. H.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., Sept. 30, 1897.

J. G. RUCKMAN, Esq.,
U. S. Storekeeper, Parkersburg, West Va.

SIR: You are hereby transferred from day service at the distillery warehouse of Hannis Dis. Co., # 1, in the district of W. Va., and assigned for add'l service to the distillery warehouse of Hannis Dis. Co. # 1 in the same district, under direction of the collector, to take effect Oct. 1, 1897.

Your compensation will be four dollars per day for such time as you shall be actually employed.

You will turn all keys, books, and papers in your possession to your successor, or to the collector, as the case may be.

Respectfully, yours,

W. S. FORMAN,
Commissioner.

44 REVOCATION OF ASSIGNMENT OF U. S. STOREKEEPER.

T. A. C., T. L. S., A. B. C. G. W. W.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., Sept. 30, 1897.

W. BUTLER, Esq.,
U. S. Storekeeper, Parkersburg, West Va.

SIR: Your assignment to duty for add'l service at the distillery warehouse of Hannis Dis. Co., # 1, in the district of W. Va., is hereby revoked, to take effect Sept. 30, 1897.

You will turn over all keys, books, and papers in your possession to your successor, or to the collector, as the case may be.

Respectfully, yours,

W. S. FORMAN,
Commissioner.

45 T. A. C., S. L. S., & T. E. K. G. W. W.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
Washington, D. C., Sept. 30, 1897.

[Telegram.]

WM. BUTLER,
U. S. Storekeeper, Martinsburg, West Virginia:

Your assignment for additional service to Hannis Distilling Company hereby revoked. Effective, close of business to-day.

W. S. FORMAN,
Commissioner.

Official business. Government rates. Charge Treasury Department.

46 TRANSMITTAL OF CHANGE IN ASSIGNMENTS.

T. A. C., S. L. S., & A. B. H.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF INTERNAL REVENUE,
Wsahington, D. C., Sept. 30, 1897.

A. B. WHITE, Esq.,
Collector *District, Parkersburg, West Va.*

SIR: You are hereby notified of the change in assignments of U. S. storekeepers in your district, as follows:

J. G. Ruckman	from warehouse of	Hannis Dis. Co. # 1,	day.
Do.	to warehouse of	do.	" add'l.
W. Butler	from warehouse of	do.	" "
J. D. Sutton	to warehouse of	do.	" day.

Respectfully, yours,

G. W. WILSON,
Deputy Commissioner.

"Collectors are required to report promptly to this office the day when each storekeeper, in their respective districts, begins and ceases duty under each assignment." (Series 7, Number 7, Revised, under head of "Assignment of Storekeepers.")

(Endorsed:) Filed Oct. 19, 1897. L. B. Dellicker, clerk.

46½ (FORM NO. 241—Revised.)

No. 1031c. A. B. White collector of internal revenue, the dist. W. Va., Parkersburg W. Va., September 27, 1897. Subject: Recommending changes in assignment of U. S. storekeepers.

(FORM NO. 241—Revised February 18, 1896.)

UNITED STATES INTERNAL REVENUE.

RECOMMENDING CHANGES IN ASSIGNMENTS OF U. S. STOREKEEPERS.

PARKERSBURG, *Sept. 27, 1897.*

Hon. W. S. FORMAN, *Commissioner of Internal Revenue.*

SIR: I have the honor to recommend the following changes in assignments of United States storekeepers in this the district of West Virginia, to take effect October 1, 1897:

Name.	Duty.	To or from.	Distillery.		Operating.	Suspended.	Process of distillation.		No. of hours operated in 24.	Mashing daily.	No. of proof galls. in W. H.	Remarks.
	Day, addit'l, or night.		Name.	No.			Continuous.	Not continuous.		Bushels.	Last report.	
James G. Ruckman, Skr	Day	From	The Hannis Distilling Co.	.....	.....	Suspended	.....	.....	None	None	949816.1	Martinsburg, W.Va.
William Butler, Skr....	Addit'l	From	" " " "	.....	.....	"	.....	.....	"	"	.....	"
John D. Sutton, Skr....	Day	To	The Hannis Distilling Co.	.....	.....	"	.....	.....	"	"	.....	"
James G. Ruckman, Skr	Addit'l	To	" " " "	.....	.....	"	.....	.....	"	"	.....	"

Respectfully, yours,

(Signed) A. B. WHITE, *Collector.*

NOTE.—Whenever an increase in the force of storekeepers at a distillery is recommended, the change in the condition of the distillery which renders the increase necessary should be fully set forth in the column of "Remarks."

This form may be adapted for use for storekeepers and gaugers by inserting the words "and gaugers" after the word storekeepers.

The title of the officer should follow his name in red ink, as "Skr.," "S. & G.," or "G. S. & G."

When a storekeeper and gauger is to be assigned in the separate capacity of storekeeper or of gauger, or is to be relieved from duty in either capacity, it should be so stated in red ink following his name and title, as "S. & G. as Skr.," or "S. & G. as Gauger."

When a person has been designated by the collector to act in a temporary capacity the entry should be made in red ink, and the column of remarks be made to show whether such designation has been made in the order prescribed.

47 In the circuit court of the United States for the district of West Virginia.

J. G. RUCKMAN, PLAINTIFF,
vs.
A. B. WHITE, COLLECTOR, ET AL., DEFENDANTS. } In equity.

Replication to answer.—Filed Oct. 19, 1897.

J. G. RUCKMAN, PLAINTIFF,
vs.
A. B. WHITE, COLLECTOR, ET AL., DEFENDANTS.

This repliant, J. G. Ruckman, saving and reserving to himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto saith, that he doth and will aver, maintain, and prove his said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained, material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied to, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

J. G. RUCKMAN,
By FAULKNER & WALKER,
Sol's for Complainants.

(Endorsed:) Filed Oct. 19, 1897. L. B. Dellicker, clerk.

48 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Demurrer to bill.—Filed October 8, 1897.

In the circuit court of the United States for the district of West Virginia.

J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR OF INTERNAL REVENUE for the district of West Virginia, A. L. Hoult, John D. Sutton, and Anthony Staubley. } In equity.

The demurrer of the above-named defendants, A. B. White, collector, &c., John D. Sutton, and Anthony Staubley, to the bill of the above-named plaintiff.

These defendants, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint to be true

in such manner and form as the same are therein set forth and alleged, do demur to said bill, and for cause of demurrer show—

1. That it appears by the plaintiff's own showing in this case that he is not entitled to the relief prayed by the bill against these defendants.

2. That the appointment to and removal from public office under the Government of the United States is not a ministerial act, but an executive act, and as such not subject to regulation or control by the courts.

3. That the powers of the Federal Government are divided among the legislative, executive, and judicial departments, and no authority or right to control or regulate any one of the powers is vested in either of the other two.

4. That the plaintiff has no vested right in his positions. He does not hold it by any tenure, and therefore has no such property right therein as would give him standing in a court of equity to ask the relief of the court by injunction.

49 5. That a bill of injunction lies only to protect a property right.

6. That an injunction ought not to be granted restraining the defendant A. B. White from appointing to or removing from said office, because the power to remove and to appoint to said office is not vested in said defendant A. B. White. But the power to appoint storekeepers and gaugers is vested by law in the Secretary of the Treasury alone, and the power to fix their compensation is vested in the Commissioner of Internal Revenue under the limitations prescribed by law. (See Internal Revenue Laws, sections 3153, 3156, and 3157.)

7. That the power to assign gaugers and storekeepers to duty at any given place and to terminate such assignment is vested by law in the Commissioner of Internal Revenue.

8. That the bill is based upon a misconception of the laws relative to the powers of the Secretary of the Treasury, the Commissioner of Internal Revenue, and collectors, as contained in Revised Statutes, sections 3153, 3154, 3155, 3156, 3156a, 3163, 3163a. (See also U. S. Internal Revenue Regulations and Instructions, pages 35, 120, 121.)

9. That it does not appear from the bill that the defendants Hoult, Sutton, and Staubley are not eligible to appointment and assignment under the civil-service law to the positions they are sought to be enjoined from taking.

10. That it does not appear from the bill that the defendants Hoult, Sutton, and Staubley had not already been appointed to such positions, and had not already qualified at the time the bill was filed.

11. That there can be no vested right in a gauger or storekeeper
50 to any particular assignment to duty. The right to change the particular assignments to duty of gaugers and storekeepers at will is vested in the Commissioner of Internal Revenue alone; and the exercise of that right does not affect and is not affected by the civil-service law.

12. That the act of Congress known as the civil-service law is unconstitutional.

13. That even if said act is constitutional it does not give to the plaintiff a right to invoke the aid of a court of equity, even to prevent his removal from office, and much less to prevent a change in his assignment to duty. And, even if constitutional, said act does not give the

court authority to restrain in any manner the exercise of executive discretion, but leaves the appointing power untrammelled, save by moral and executive restraints and the fear of indictment for a violation of the act.

14. Where discretion is vested by law in an executive officer concerning matters purely executive, he can not be controlled in the exercise of such discretion by the courts, but must be left free in the first instance to exercise such discretion as he may see fit, although the results of his exercise of discretion may be subject to judicial review, and the officer himself subject to punishment for the manner in which he has exercised such discretion.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, the defendants do demur thereto; and they pray the judgment of this honorable court whether they shall be compelled to make any answer to the said bill; and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

JOHN W. MASON,
JOSEPH H. GAINES, *U. S. Atty.*,
Counsel for Defendants.

51 I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JOSEPH H. GAINES,
Of Counsel for Defendants.

STATE OF WEST VIRGINIA,
County of Harrison, to wit:

A. B. White, one of the above-named defendants, on his oath, says that the foregoing demurrer is not interposed for delay.

A. B. WHITE.

Sworn to before me this 8 day of October, 1897.

L. B. DELLICKER, *Clerk.*

(Endorsed:) Circuit court U. S., dist. W. Va. Filed in office this 8th day of October, 1897. L. B. Dellicker, clerk.

52 In the United States circuit court for the district of W. Va.

J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Joinder in demurrer.—Filed Oct. 19, 1897.

R. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL.

And the said R. G. Ruckman, the complainant, says that the said bill in equity and the matter therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said

defendants to answer the same, and the said complainant is ready to verify and prove the same as the court shall hereby direct and award.

R. G. RUCKMAN,
By FAULKNER & WALKER,
Sol's for Complainant.

(Endorsed:) Filed Oct. 19, 1897. L. B. Dellicker, clerk.

53 J. G. RUCKMAN *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order authorising appointment of temporary guager and storekeeper pending the proceedings in this suit.—Entered October 12, 1897.

WILLIAM BUTLER *vs.* A. B. WHITE ET AL. } In equity.

J. G. RUCKMAN *vs.* A. B. WHITE ET AL. } In equity.

H. C. BERRY *vs.* A. B. WHITE ET AL. } In equity.

A. B. White, esq., the collector of internal revenue for this district, having represented to the court that there exists an actual necessity for a guager to guage spirits that may be manufactured into the bonded warehouse of the Hannis Distillery Company, and also that there is a necessity for an additional storekeeper to weigh in grain and to attend to meal rooms, etc., in connection with the operating of distillery, and unless authority is given to employ these additional laborers he will be unable to let the distillery be run, it is therefore ordered that leave be granted to him to employ the additional guager and storekeeper that he desires, pending the proceedings upon the injunction in this court. But this order is in no wise to affect the rights of any of the parties interested in these proceedings.

(Endorsed:) Enter. Jackson, judge. Oct. 12, '97.

54 J. G. RUCKMAN *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of J. C. McMahon.—Filed October 21st, 1897.

J. G. RUCKMAN *vs.* A. B. WHITE, COLLECTOR, ET AL. }

This day J. C. McMahon personally appeared before me, Geo. W. Johnson, notary in and for the county of Berkeley and State of West Virginia, and, after being duly sworn, made oath as follows:

I am the same J. C. McMahon who was appointed to serve the copy of the injunction order in the above-entitled cause. Copies of these orders with the originals were placed in my hands to be executed on the

1st day of October, 1897. I proceeded at once to Martinsburg, arriving there the same evening, when I executed the process on the evening of the 1st of October, 1897, upon the defendants F. T. Thayer, John D. Sutton, and on Oct. 2nd, 1897, on Anthony Staubley and J. G. Ruckman. On the 5th of October I received the same processes upon the same parties, there being some question as to the certificate of the clerk of the circuit court attached to the first processes served.

This affiant further says that he was present at this distillery in Martinsburg on the 2nd of October, and saw whilst there J. G. Ruckman performing and exercising the duties of storekeeper in charge. I also saw there the same day Wm. Butler, asst. storekeeper, and H. C. Berry, *guager*, but was not present when they performed any duties of their respective offices, if any, that day.

This affiant further says that he was present on the 2nd day of October in the office at said distillery when F. T. Thayer, between 10 and 11 o'clock, came to said office. In a few minutes after his arrival, H. C. Berry, the *guager*, came to the office, and after some conversation between them, which I did not hear . Standing near
55 them, while they were seated in the office, I heard in substance the following conversation: Mr. Berry asked Mr. Thayer if he had come out to the distillery for the purpose of taking possession of the office of *guager* and to take under his control the property of the Government that was incident to that office. Mr. Thayer replied that he believed those were his instructions. Mr. Berry answered, "If you will answer my question in the affirmative, we can settle this matter in 5 minutes." Mr. Thayer then replied that he had been instructed by Collector White to come out there that morning and take possession, but that these instructions were given before the injunction order had been served upon him, and he thought he had better go back to town and communicate with the collector and commissioner. He then left the distillery, and I did not see him out there again.

And further affiant sayeth nothing.

J. C. McMAHON.

Subscribed and sworn to before me this 18th day of October, 1897.

[NOTARY'S SEAL.] GEO. W. JOHNSON,
Notary Public.

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

56 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of C. J. Faulkner.—Filed October 21, 1897.

J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } Affidavit.

This day C. J. Faulkner personally appeared before me, a notary public in and for the county of Berkeley, State of West Virginia, and, after being first duly sworn, deposeth and says: That on the morning of the 2nd

day of October, 1897, between the hours of 10 and 11 o'clock a. m., he received a telephone message requesting him to come out to the Hannisville distillery, in the town of Martinsburg, West Virginia; that in response to said message he drove out there, and after being out there a few minutes F. T. Thayer came out to the distillery, and a short time after the arrival of Mr. Thayer, H. C. Berry appeared at the distillery, bringing with him a letter addressed to Mr. Ruckman, which authorised him to act as additional storekeeper at said distillery. When Mr. Berry came in Mr. Thayer spoke to him and asked him whether he was the *guager*. He stated that he was. He then showed Mr. Berry a telegram from the Commissioner of Internal Revenue assigning him as *guager* at the Hannisville distillery. Mr. Berry then propounded to him this question: "Have you come out here this morning to take possession of this office and the property of the Government now in my possession as *guager*?" Mr. Thayer responded that he understood such to be the order of the Commissioner, but that he didn't know whether it would be proper for him to do so. Mr. Berry replied, "If you will answer my question in the affirmative, we can settle this matter in 5 minutes." Mr. Thayer then said that the collector had told him the evening before to come out to the distillery and take possession of the office, but at the time he had received these instructions he had not been served
57 with the injunction order issued in the case of H. C. Berry vs. A. B. White, collector, et al., and that he therefore felt it his duty before doing anything further to communicate with the collector and Commissioner of Internal Revenue. Mr Thayer then arose from his seat and left the office and grounds of the distillery.

CHAS. J. FAULKNER.

Subscribed to and sworn to before me this 20th day of October, 1897.

[NOTARY'S SEAL.] GEO. W. JOHNSON,
Notary Public.

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

58 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of J. G. Ruckman.—Filed October 21, 1897.

J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } Affidavit.

This day J. G. Ruckman, complainant in the above-entitled cause, personally appeared before me, Geo. W. Johnson, a notary public in and for the county of Berkeley, State of West Virginia, and, after being duly sworn, made oath as follows:

That this affiant was appointed a storekeeper by the Secretary of the Treasury in June, 1893; that he qualified as such by taking oath of office and executing his bond in accordance with law; that at the date of filing

the bill of injunction in this case and the issuing and service of injunction upon John D. Sutton he was performing and discharging the duties of head storekeeper at the Hannisville distillery; that it is not true, as stated in said answer, that this affiant was notified of the revocation of his assignment of head storekeeper and his assignment of additional storekeeper, or that he was found on the 1st day of October, 1897, performing the duties of additional storekeeper at said distillery. This affiant avers that he only received official notice of the revocation of his assignment as head storekeeper, and his assignment as additional storekeeper, at 10.55 a. m. on the morning of the 2nd day of Oct., 1897. The letter of the Commissioner conveying this information was dated the 30th of Sept. in Washington, countersigned by the collector in Parkersburg on the 1st of October, and mailed from that office at 4 p. m. on that date, the service of process of injunction in this and the other cause of H. C. Berry vs. A. B. White, collector, et al., having been made on the evening of the 1st of October, 1897. This affiant further avers that although the said John D. Sutton was in Martinsburg on the 1st of October, that
59 he admitted to this affiant that he had received no authority from the Department to act as storekeeper at this distillery, and subsequently stated to this affiant that the authority reached him only on the morning of the 2nd of October, 1897. On the evening of the 2nd of October this affiant received what purported to be a telegram from the Commissioner of Internal Revenue continuing him as head storekeeper, as shown by affiant's Exhibit "A," a true copy of which is herewith filed and asked to be taken as part of this affidavit. This affiant therefore avers that from his assignment as head storekeeper, from the 1st of September to the present time, he has acted in that capacity, and in no other, to the time of making this affidavit. He further avers that he notified said White that he could not act as additional storekeeper, as he had been served with an injunction, obtained at the instance of William Butler, prohibiting him from interfering with the said Butler and performing the duties of said office until a further order of the court. This affiant further avers that the said John D. Sutton, under a recommendation of the said White and appointment by the Commissioner of Internal Revenue as head storekeeper, has never performed any duties of the said office or attempted to do so under said appointment, and that he, the said Ruckman, has been and is the only storekeeper actively performing the duties since the night of the 30th of September at said distillery.

This affiant further avers that the said White, collector, although neither admitting or denying his competency and efficiency to discharge the duties of said office in his answer, did know at the time of making the same, from information given him by his deputy collectors and others in the revenue office, as well as by his personal knowledge obtained during the three months of his term, that this affiant was in every way competent and efficient to discharge any of the duties devolving upon a storekeeper, and this affiant avers that in anticipation of his being relieved from duty on the assignment of the defendant John D.
60 Sutton as head storekeeper; that on two occasions the said White, in writing, appealed to this affiant to assist the said Sutton in the discharge of the duties of head storekeeper, as the said White was fully

aware of the fact that although the said Sutton had previously acted as storekeeper, that it was as an additional storekeeper, the duties of which are simply that of a guard, and that he was entirely unfamiliar with the difficult and intricate work that devolved upon a storekeeper in keeping books and making reports. This affiant confidently appeals to the records of both the Commissioner of Internal Revenue and that of the collector of the district as his complete vindication of any insinuation contained in said answer which can be construed as implying a charge of inefficiency in the discharge of his duties.

This affiant avers that under the 3rd clause of rule 2 that the Commissioner of the Internal Revenue has no right to transfer or assign this affiant under a recommendation of the collector of the district from head storekeeper to additional storekeeper, as it changes his official rank, "because of his political or religious opinions or affiliations," as this affiant charges that such transfer or assignment does in fact change his official rank, and makes him subordinate and subject to the orders of the head storekeeper.

This affiant charges, upon information and belief, based upon the facts set forth in his bill and upon those which I will proceed to state, that the defendant White was influenced in his recommendation asking the Department to transfer this affiant from head storekeeper to additional storekeeper by the fact, and that alone, that this affiant was a Democrat in politics. This affiant had a conversation with the said White in his office in Parkersburg on the 1st day of July, 1897, about the time of his qualification as collector, on the subject of removals from office in this State, in which he stated that he would like to get rid of all the deputy collectors as soon as possible, but that the storekeepers and *guag-*
61 ers were bonded to the Government, and he would move them only as he could move in an old Republican soldier; and this affiant further avers that on the 3rd day of October, 1897, at my house in Martinsburg, in a conversation with the said White, he stated to this affiant, "I am a Republican, and I am going to get in (referring to these offices) as many of these fellows as I can, and you all ought not to object." In an editorial which appeared in the Parkersburg State Journal on Friday, Sept. 10th, 1897, the same view and sentiment is expressed, as will be shown by affiant's Exhibit "B," herewith filed, and asked to considered as a part of this affidavit. This affiant further avers that *that* the collector recommended the revocation of his authority as head storekeeper within 30 days of his assignment, when the law authorizes the assignment for 60 days, and then assigns to said position the said John D. Sutton, of Braxton County, West Virginia, a Republican, and who had been commissioned in August; and at the time of said act there were residing in the town of Martinsburg two other Democratic storekeepers, one of whom was recognized for his competency and efficiency in discharging the duties of head storekeeper.

This affiant would further state, as a reason for his charge that his removal or transfer was controlled by reason of his politics, the following statement of facts, which he has obtained on information and believes the same to be true: That on or about the 1st of July, 1897, when the said White qualified as collector, that there were in the active service of the Revenue Department in the district of West Virginia 2 storekeepers,

3 guagers assigned and 1 at large, 4 storekeepers and guagers. There were on or about that time commissioned but not assigned in said district 2 storekeepers, 7 guagers, and 7 storekeepers and guagers, making from 75% to 135% to these different offices commissioned but not assigned, 3 of whom had obtained their position through civil-service examination; that as it appears from an editorial in the Parkersburg State Journal, of which the said White is editor, that he has
62 recommended and there has been appointed since that date 9 or 10 additional officers, notwithstanding the provision of the statute that limits appointments to 15% in excess of those actively and necessarily employed. And this affiant would further refer to the exhibit filed with the bill, an extract from the Parkersburg State Journal and copied in the Daily World of this city, in which it is announced that Anthony Staubley and John D. Sutton would be assigned as storekeepers at the Hannisville distillery, when but two storekeepers were then required for duty.

This affiant further avers that he has read the affidavit to be filed in the case of H. C. Berry vs. A. B. White, collector, et al., relating to the conversation between the said Berry and F. T. Thayer; that he was present at said conversation, and that the statement made by the said Berry is in substance true and correct according to his recollection.

And further this affiant sayeth nothing.

J. G. RUCKMAN.

Subscribed to and sworn to before me this 13th day of Oct., 1897.

GEO. W. JOHNSON,
Notary Public.

EXHIBIT A.

(Received at 6.51 p. m., Martinsburg, W. Va., Oct. 2nd, 1897. Dated Washington, D. C., 2nd.)

To JAMES G. RUCKMAN,
Storekeeper, Martinsburg, W. Va.:

Remain in charge of warehouse until further orders.

(Signed) W. S. FOREMAN,
Commissioner.

(Copy.)

63 EXHIBIT B.

What is the matter with Ritchie County? It is one of the best Republican counties in the State, and I do not see a single name among Collector White's newly appointed assistants. Possibly old Ritchie gives such big majorities that it isn't necessary to give the faithful here a chance to feed at the public crib.—(Pennsboro News.)

Isn't our contemporary a little off its base as to its information? The collector has made but three appointments to excepted positions, which include the cashier at the Parkersburg office and the stamp deputy at Wheeling.

By law, Union soldiers are entitled to reinstatement when vacancies arise, and some nine or ten old soldiers have thus been reinstated by the Washington authorities and assigned to duty by the collector.

But the collector isn't making any appointments, because he can not; neither has he the power of removal.

But he is doing the best he can when he manages to get a place for a Union soldier formerly in the service.

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

64 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of J. G. Ruckman.—Filed October 21, 1897.

In the circuit court of the United States for the district of West Va.

J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL.

This affiant, J. G. Ruckman, personally appearing before me, George W. Johnson, a notary public in and for the county of Berkeley, W. Va., after being sworn, deposeth and says:

That the said Sutton, a defendant in the above-entitled cause, was not at the distillery in Martinsburgh, W. Va., on the 1st day of October, 1897, after 12 o'clock at noon of said day.

J. G. RUCKMAN.

Subscribed and sworn to before me this 21st day of Oct., 1897.

[NOTARY'S SEAL.] GEO. W. JOHNSON,
Notary Public.

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

65 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of John D. Sutton.—Filed October 21, 1897.

John D. Sutton, being first duly sworn, one of the defendants in the cause of J. G. Ruckman vs. A. B. White and others now pending in the circuit court of the United States for West Virginia, says that he is a United States storekeeper for the dist. of West Virginia, duly appointed and qualified; that he was appointed storekeeper on the 16th day of August, 1897, and has remained in office continuously ever since; that on the 30th day of Sept., 1897, a telegram from the Commissioner of Internal Revenue assigned him to duty as day storekeeper at the Hannis distillery in Martinsburg, W. Va., which said telegram is given

in the copies of the records certified by the Secretary of the Treasury presented in this cause; and that early in the morning of Oct. first he reported at said Hannis distillery for duty, and saw the collector at Martinsburg there that day, who notified him of the orders of the Commissioner; and affiant remained for official duty at said distillery on the morning of Oct. first, and until he received a copy of the order made in this cause, prohibiting him from performing such duty, which order was served upon him at 9 p. m. or later on the night of October first.

JOHN D. SUTTON.

Taken, subscribed, and sworn to before me this 18th day of Oct., 1897.

U. S. G. PITZER,
Notary Public.

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

66 J. G. RUCKMAN *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of J. D. Sutton, storekeeper.—Filed October 21, 1897.

J. G. RUCKMAN *vs.* A. B. WHITE ET AL. } In equity.

In the circuit court of the United States for the district of West Virginia.

John D. Sutton, being first duly sworn, one of the defendants in the above cause, now pending in the circuit court of the United States for the district of West Virginia, says: That he has read the affidavit of J. G. Ruckman filed in this cause, and says that affiant did not say to said Ruckman as stated in said affidavit, on the first day of October, that affiant had received no authority to act as storekeeper at the Hannis Distillery, but affiant stated that he had been notified by the collector of his assignment to duty as storekeeper, and that affiant then reported for duty as day storekeeper pursuant to such authority. That the statement aforesaid was made by affiant to said Ruckman on the first day of October, 1897, and that about half past four o'clock on the same day (Oct. 1st) he received a telegram from the collector's office at Parkersburg notifying him of his said assignment, a copy of which is herewith annexed as a part of this affidavit, marked Exhibit No. 1. Affiant says that he was served with a copy of the order in this case at about nine o'clock p. m. Oct. 1st, 1897.

Affiant says that he was additional storekeeper at the Hannis distillery from 1889 to 1892, and knows the duties of additional storekeeper. That when he was at the Hannis distillery on the said 1st day of Oct., 1897, he saw said Ruckman performing the duties of additional storekeeper as well as other duties. That said affiant has been at said distillery nearly every day since the first day of October, 1897, and that he believes

that the said J. G. Ruckman and no other person has performed the duties of additional storekeeper which had been performed by William Butler.

67 Subscribed and sworn to before me this 19th day of October, 1897.

U. S. G. PITZER,
Notary Public.

EXHIBIT No. 1.

The Western Union Telegraph Company.

(Received at 4:10 p. m. Oct. 1, 1897, dated Parkersburg, W. Va.)

To J. D. SUTTON, *U. S. Storekeeper, Mbg., W. Va.:*
Go on duty; your assignment by Commissioner reach you in morning.

W. E. WHITE, *Chief Deputy.*

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

68 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of A. B. White.—Filed October 21, 1897.

J. G. RUCKMAN
vs.
A. B. WHITE ET AL. } In equity.

In the circuit court of the United States for the district of West Virginia.

A. B. White, being first duly sworn, one of the defendants in the above-named cause now pending in the circuit court of the United States for the district of West Virginia, says that he has read the affidavit of Ruckman filed in this cause and denies the truthfulness of said plaintiff's allegation that he (Ruckman) was not performing the duties of additional storekeeper at the Hannis distillery on October first. On the contrary, said Ruckman performed the duties of additional storekeeper on that day, heretofore attended to by defendant Butler, and has continued to do so, as well as other duties.

Affiant further avers that said Ruckman knew what his assignment was and was officially notified of same by the collector, under whose directions he performs his duties, on October first, and before any injunction was served on defendant Sutton.

Affiant further avers that plaintiff has acted in other capacity than head storekeeper since October first, and has attended to the duties of additional storekeeper, hitherto performed by Butler, on October first and since that date.

Affiant again denies that the assignment of Ruckman to duty was made for political reasons and denies the accuracy or correctness of the reported interview with him on July first, 1897; that affiant's appointment as

collector had only been made a few days before; that he had had no time to examine the law, and so stated, and that his remarks on deputy collectors were based on the generally accepted belief that such officers would be removed from the classified service in the amended orders about to be issued by the President, and that affiant said he could give no
69 indication at that time what he could do as to storekeepers and *guag*ers, and had given the matter no consideration at that time.

Affiant specifically denies that he made the statements in the manner alleged by Ruckman on October third, but avers, on the contrary, that he told Ruckman that it had been his intention to keep him on duty.

Affiant denies that the editorial in the State Journal of September tenth has any bearing on the case, since another person wrote it, but if said White had written it it did not say nor imply that the nine or ten West Virginia soldiers reinstated or about to be reinstated in the Revenue Service were to be storekeepers or *guag*ers; on the contrary, the majority were for deputy collectors or for departmental transfers.

Affiant further denies that a certain article alleged to be copied from a news article in the State Journal stated that defendants Sutton and Staubley would be assigned to duty at the Hannis distillery when only two storekeepers were needed; on the contrary, the appointment of Staubley would have been conditioned, had it been made, on the resumption of operations at the distillery and its consequent need of three or more storekeepers.

Affiant further denies that plaintiff Ruckman is the superior in efficiency of Storekeepers League, Daniels, Sutton, or others in the service.

Affiant again denies that he has violated any law, rule, regulation, or edict of the President, Congress, the Civil Service Commission, or his superior officers of the Treasury Department.

A. B. WHITE.

Subscribed and sworn to before me this 19th day of October, 1897.

JASPER Y. MOORE,
Clerk D. C. U. S., D. W. Va.

70 (Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

71 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of A. B. White, collector.—Filed October 21, 1897.

A. B. White, being first duly sworn, says that he is one of the defendants in the cause of J. G. Ruckman vs. A. B. White and others now pending in the circuit court of the United States for the district of West Virginia; that he did not assign the defendant John D. Sutton as day storekeeper at the Hannis distillery, nor did he revoke the assignment of the plaintiff, J. G. Ruckman, at said distillery. Affiant says that the assignment of said Ruckman was revoked and the assignment of said Sutton made by the Commissioner of Internal Revenue on the 30th day of September, 1897; that the affiant had nothing to do with said revocation or assignment except to recommend the same to his superior officer,

the Commissioner of Internal Revenue, which he did on the usual office form, No. 241, on the 27th day of September, 1897; that this is the usual manner prescribed by the rules and regulations of the Internal Revenue Bureau for the assignment and revocation of assignment of U. S. storekeepers; that said recommendation was made as said affiant believes for the good of the service and that the revocation and assignment of said Ruckman was not made for political reasons, nor was his compensation affected thereby.

Affiant further says that he was at said distillery on the first day of October, 1897, and found the said Sutton had reported at said distillery that morning for duty and that he found the plaintiff, Ruckman, in the warerooms of said distillery performing the duties of additional storekeeper, which were proper to be performed under his new assignment, and that said affiant verbally called said Ruckman's attention to the assignments made by the Commissioner the day before and notified said Ruckman that said Sutton was on duty by telegraph orders of the Commissioner as day storekeeper and that said Ruckman was on duty as additional storekeeper.

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A. B. WHITE.

Taken, subscribed, and sworn before me this 18th day of October, 1897.

U. S. G. PITZER,
Notary Public.

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

73 J. G. RUCKMAN *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

Affidavit of G. W. Wilson, Act. Comr. Int. Rev.—Filed October 21, 1897.

J. G. RUCKMAN *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

In the circuit court of the United States for the district of West Virginia.

WASHINGTON, *District of Columbia, ss:*

G. W. Wilson, being first duly sworn, says that he is the Acting Commissioner of Internal Revenue; that A. S. Forman, the Commissioner of Internal Revenue, is in the State of Illinois and has been in Illinois continuously for the past three weeks. Affiant further says that the revocation of the assignment of the plaintiff as day storekeeper at the Hannis distillery and the assignment of John D. Sutton in the place of plaintiff were made by the said W. S. Forman, Commissioner of Internal Revenue; that affiant knew of the said revocation at the time it was made and the circumstances and cause thereof, the same having come to the knowledge of affiant in the course and exercise of his official duties; that affiant knows that the said revocation and the assignment of John D. Sutton in the place of the plaintiff were not made for political reasons, or because

of the political or religious opinions or affiliations either of the plaintiff or of the said John D. Sutton, but because of other reasons involving the good of the service.

G. W. WILSON,
Acting Commissioner of Internal Revenue.

Subscribed and sworn to before me this 19th day of October, A. D. 1897.
[NOTARY'S SEAL.] JOHN T. BIVINS,
Notary Public.

(Endorsed:) Filed in open court this 21st day of October, 1897. L. B. Dellicker, clerk.

74 J. G. RUCKMAN *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order docketing cause at Martinsburg.—Entered October 22, 1897.

This day came the plaintiff by Messrs. Faulkner & Walker, his attorneys, and presented to the court the original papers in the above-entitled cause, together with a duly certified transcript from the circuit court of the United States for the district of West Virginia, sitting at Wheeling, remitting said cause to this court; and on his motion it is ordered that said cause be docketed herein.

Enter.

JACKSON, *Judge.*

OCT. 22, '97.

75 J. G. RUCKMAN *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order continuing injunction, &c.—Entered October 22, 1897.

J. G. RUCKMAN *vs.* A. B. WHITE, COLLECTOR, ET AL. } In equity.

In the circuit court of the United States for the district of West Virginia, sitting at Martinsburg, W. Va.

This case having been set for hearing on the 18th day of October, 1897, upon the motion of the complainant to have the injunction made absolute, and restraining and prohibiting the defendant White and other defendants named in the bill, and all other persons, from removing the complainant or revoking his assignment as storekeeper at the Hannis distillery, in the district of West Virginia, or in any wise interfering with him in his said position as storekeeper, and upon the bill and exhibits filed by the complainant and the answer and demurrer by the defendants, and exhibits filed therewith, and affidavits filed, respectively, by the complainant and defendants, under agreement between the parties that the court consider

both demurrer and answer, with the supporting proof, upon the motion for an absolute injunction, and was argued by counsel.

And the court not being ready at this time to pass upon the questions involved in the consideration of the motion, but the court desiring to take time for the consideration of the same, it is therefore ordered that the preliminary injunction heretofore awarded in this case be continued until the further order of this court.

And A. B. White, esq., collector of internal revenue for this district, having represented to the court that the Hannis Distilling Company have notified him of their desire to commence full operations and to run said distillery both day and night, and that in order that the interest
76 of the Government might be properly protected it is necessary that there should be 4 storekeepers and 1 additional *gauger* assigned to duty at said distillery temporarily until the court can pass upon the questions involved in the 3 suits of H. C. Berry, J. G. Ruckman, and William Butler against A. B. White, collector, et al., which by agreement of parties has been heard by the court together, it is ordered that the injunction heretofore granted be modified to the extent of allowing the assignment of 4 storekeepers in all and 2 *gaugers* in all to the Hannis distillery, none of whom hold commissions as storekeepers and *gaugers*, or as such are assigned by the Commissioner of Internal Revenue from the district of West Virginia; but this provision shall have no application to J. G. Ruckman as storekeeper under the authority which he is exercising at the present time under the directions of the Commissioner of Internal Revenue, and none of the defendants to this suit shall be assigned to the said positions pending the further consideration of these causes by the court, and this order is not in any wise to affect or impair the rights or change the status quo of the parties interested in these proceedings.

Enter.

J. J. JACKSON, *Judge*.

OCTOBER 22, 1897.

77 J. G. RUCKMAN, PLAINTIFF,
vs.
A. B. WHITE, COLLECTOR, ET AL., DEFENDANTS,
and
WILLIAM BUTLER, PLAINTIFF,
vs.
A. B. WHITE, COLLECTOR, &C., ET AL., DEFENDANTS,
and
H. C. BERRY, PLAINTIFF,
vs.
A. B. WHITE, COLLECTOR, &C., ET AL., DEFENDANTS.
} In equity.

Opinion.—Filed Nov. 8, 1897.

These causes are now heard upon the bills of plaintiffs and the demurrers and answers of defendants, which, by stipulation of counsel, are heard together.

The object and purpose of the bills is to restrain the defendant from removing the plaintiffs in this action from their present positions as

gauger and storekeeper, respectively, in the Hannis distillery or transferring them to any other and subordinate positions in the same distillery.

These officers were commissioned by the Government and assigned to duty, and were in the active discharge of the functions of their respective offices when the defendant White was appointed collector of internal revenue for the district of West Virginia.

It is alleged in the bills that this defendant is about to remove the plaintiffs in these actions upon political grounds, and it is claimed that neither the defendant nor the appointing power has the right or power to remove the incumbents from their offices for political reasons.

The demurrers to the bills in these cases raise fourteen grounds of objection, which may all be embraced in three points.

First. Is the act of Congress, known as the civil-service act, passed in 1871 and as amended in 1883, constitutional?

In considering this question it is well to refer to the history of the country which finally led to the passage of this act. The learned counsel who argued these cases on behalf of the plaintiffs reviewed, to some extent, the action of the various Administrations of this Government from that of Washington down to 1820, when Congress passed an act fixing, for the first time, the tenure of office for district attorneys and marshals of the United States. Prior to this time it appears that removals from office were comparatively few and that such action, when had, was always for causes other than political.

After the passage of the act of 1820 subsequent Administrations began to make changes in that class of officers who held their positions at the pleasure of the Executive. As the country grew, not only in territory but in population, the thirst and greed for office became so great that a growing necessity was felt that some legislation should be had to correct, as far as possible, the evils growing out of the existing system of appointments. Such was the condition of the public mind of the country that President Grant, one of the greatest men that ever occupied the Presidential chair, felt it incumbent on himself in his annual message of December 4th, 1870, to call the attention of Congress to the importance and necessity of reform in "the manner of making all appointments." He employs the following strong and striking language in his message, from which I quote:

"Always favoring practical reforms, I respectfully call your attention to one abuse of long standing which I would like to see remedied by this Congress. It is a reform in the civil service of the country. I would have it go beyond the mere fixing of the tenure of office of clerks and employes who do not require 'the advice and consent of the Senate' to make their appointments complete. I would have it govern, not the tenure, but the manner of making all appointments. There is no duty which so embarrasses the Executive and heads of departments as that of appointments, nor is there any such arduous and thankless labor imposed on Senators and Representatives as that of finding places for constituents. The present system does not secure the best men, and often not even fit men, for public place. The elevation and purification of the civil service of the Government will be hailed with approval by the whole people of the United States."

In pursuance of this recommendation of President Grant, Congress, on the 3rd day of March, 1871, passed an act the purpose and object of which, amongst other things, was "to regulate admissions to the civil service." It appears, however, that this act was insufficient to accomplish the purposes for which it was framed. Its terms and provisions were so criticised that there was a consensus of opinion that further legislation was needed. President Arthur, influenced no doubt by the public sentiment of the country, felt it his duty in his annual message of December 4th, 1882, to the Forty-seventh Congress, to call the attention of that body to this subject, in which he employed the following language: "I trust that before the close of the present session some decisive action may be taken for the correction of the evils which adhere in the present method of appointment, and I assure you of my hearty cooperation in any measures which are likely to conduce to that end."

After this recommendation of President Arthur, Congress took up the subject and promptly passed an act "to regulate and improve the civil service of the United States," which was approved by the President on the 16th day of January, 1883. Bills were introduced in both Houses of Congress, but the bill that was passed by the Senate, after much discussion in the House, was passed by the House and approved by the President. In the discussion that took place upon this bill in the Senate, some of the most distinguished lawyers of that body participated, among whom were Senator Hoar, of Massachusetts; Senator Edmunds, of Vermont; Senator Brown, of Georgia; Senator George, of Mississippi; Senator Ingalls, of Kansas; Senator Cockerell, of Missouri, and Senator Allison, of Iowa. I refer to the utterances of these distinguished lawyers as part of the cotemporaneous history of this act, and it is to be observed that not one of these gentlemen entertained any doubts as to the constitutionality of this act, but the general trend of the discussion seems to have conceded its constitutionality. The utterances of both Senator Hoar and Senator Edmunds maintain its constitutionality, and the skeptical legal mind that differs with me and entertains doubts as to the constitutionality of the act is referred to the able discussions that took place at the time it was under consideration. This court might well content itself with what it has now said, but I am not either without authority or precedent upon this subject. The Constitution of the United States, article 1, section 2, paragraph 18, confers upon Congress the right "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." Under this provision of the Constitution, Congress, as early as the 27th day of July, 1789, passed an act that "the head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." That act has been in force from the day of its passage to the present time. Here is a power conferred by the authority of Congress upon the head of each department, and is in no sense a delegated power of legislation. The evident purpose of Congress was to furnish each department with

authority to regulate the conduct of its officers and employes and the distribution and performance of the business of the office. If such a power to legislate had been delegated under that act, the courts
78 of this country would long since have been invoked to pass upon the power of Congress to delegate a power to the head of any department which alone belonged to it; but long acquiescence in the act is of itself sufficient evidence of the right of Congress to pass it. Judge Marshall, in his opinion in the case of McCulloch vs. State of Maryland, 4 Wheaton, 430, uses the following language, which I think appropriate to the discussion of the question under consideration:

"All must admit that the powers of the Government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

In the case of Ex parte Curtis, 106 U. S., 371, this doctrine was again affirmed by the Supreme Court of the United States in an opinion delivered by Chief Justice Waite, in which he uses the following language:

"That the Government of the United States is one of delegated powers only, and that its authority is defined and limited by the Constitution, are no longer open questions, but express authority is given Congress by the Constitution to make all laws necessary and proper to carry into effect the powers that are delegated. (Art. 1, sect. 8.) Within the legitimate scope of this grant Congress is permitted to determine for itself what is necessary and what is proper."

I assume that when Congress passed these acts it did determine for itself what was necessary and what was proper; that there was a necessity to remedy the evil growing out of the existing appointments to office, and that the acts passed were constitutional and therefore proper. Is it not competent and clearly within the legitimate scope of the powers of Congress, under the Constitution, to remedy an existing evil? If so, did Congress in the passage of these acts exceed its legitimate power under the Constitution? I think not. Under our system of government Congress by law is vested with the power alone to remedy existing evils; but it is the duty of the Executive, when Congress by an act applies a remedy, to see that the act is faithfully enforced. When Congress undertakes to apply a remedy to an evil by repealing an existing law, or by amending the law, or by the passage of an act which has for its object an improvement of the civil service of the country, can it be said that Congress has exceeded its power? I think not. If the time should ever come in the history of this Government when Congress can not regulate the administration of the civil service of the country in my judgment it will be an untoward event, which will strike at the very foundation of the existence of the Government.

I reach the conclusion that there can be no question as to the constitutional power of Congress to pass these acts. In support of this position

I cite article 1, section 8, clause 18, of the Constitution of the United States; Marbury v. Madison, 1 Kranch, 137; McCulloch v. Maryland, 4 Wheaton, 421; Ex parte Hennen, 13 Peters, 259; Ex parte Curtis, 106 U. S., 371; United States v. Perkins, 116 U. S., 483.

The second ground of demurrer is, that the assignment or revocation of assignment of these parties to duty is not protected by the provisions of the civil-service law or the regulations in pursuance thereof.

It is urged that the plaintiffs hold positions not technically in the executive civil service. I can not agree with this position. Rule 3, section 1, of the revised rules, promulgated May 6th, 1896, declares "that all that part of the executive civil service of the United States which has been or may hereafter be classified under the civil-service act shall be arranged in branches, as follows: The departmental service, the custom-house service, the post-office service, the Government printing service, and the internal-revenue service."

Storekeepers and gaugers are appointed by the Secretary of the Treasury, and are required by the statute to take an oath to faithfully perform the duties of their offices and to give bond for the faithful discharge of their duties. The storekeepers are to receive a compensation not to exceed four dollars a day, to be determined by the Commissioner of Internal Revenue, and are not permitted to engage in any other business while in the service of the United States without the written permission of the Commissioner of Internal Revenue. The fees of gaugers are to be determined by the quantity gauged, under such regulations as the Commissioner may prescribe.

These places held by the plaintiffs are positions of honor and trust, and have attached to them a fair compensation. It is true that their duties are ministerial, yet the faithful discharge of them is so important to the Government as to require men of capacity and integrity. Section 6 of the same rule declares that "the internal-revenue service shall include officers and employes in any internal-revenue district who have been, or may hereafter be, classified under the civil-service act." By the direction of the President, the Secretary of the Treasury classified all persons not before classified in the internal-revenue service, except those merely employed as laborers or workmen and those whose appointments are subject to confirmation by the Senate, and made report to the Commission in pursuance of rule 12, section 1. It must be apparent that gaugers and storekeepers are either "officers or employes" in the Internal-Revenue Department, and it is immaterial whether they are officers or employes. In either event they are protected under the rules of the civil service, as they do not fall within the exception of rule 12, section 1.

The Acting Commission' of Internal Revenue, Mr. G. W. Wilson, reported to the Commission the classification of the internal-revenue service, which was approved by the Secretary of the Treasury. A provision of section 7 of the act is, that after the expiration of six months from the passage of the act "no officer or clerk shall be appointed, and no person shall be employed to enter, or be promoted, in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination, in conformity herewith." But this act provides for certain exceptions, one of which is that persons who have been

honorably discharged from the military or naval service are not required to be classified under this act. By rule 3, section 1, the internal-revenue service was placed in the classified service, and under section 6 there was included "the officers and employes in any internal-revenue district who have been, or may hereafter be, classified under the civil-service act." As we have seen, section 7 forbids the appointment of a person, after the expiration of six months from the passage of the act, until he has passed an examination or is shown to be specially exempt from such examination in conformity with its provisions. The plaintiffs in these actions having been more than six months in possession of the offices from which it is now sought to remove them, no person can be appointed or employed to take either of said positions except as provided for in section 7, unless they fall within the exception to rule 9.

But it is claimed that the assignments made to take the places of the plaintiffs in these various actions do fall within the exception to rule 9, which provides that "a vacancy in any position which has been, or may hereafter be, classified under the civil-service act may, upon requisition of the proper officer and the certificate of the Commission, be filled by the reinstatement, without examination, of any person who, within one year preceding the date of said requisition, has, through no delinquency or misconduct, been separated from a position included within the classified service at the date of said requisition, and in that department or office and that branch of the service in which said vacancy exists."

The answer to this position is that there are no vacancies, and until vacancies occur, under the rules of the civil service no assignments can be made. In the cases before us there are no vacancies in these positions, either by death or resignation, nor can there be vacancies by removal, unless they are in conformity with the civil-service act and the rules and regulations made under it. But it is insisted that this is not a removal, but a transfer, and that under the provisions of section 3154, passed August 15th, 1876, the Commissioner may transfer any gauger or storekeeper. That section provides that "the Commissioner may also transfer any inspector, gauger, storekeeper, or storekeeper and gauger
79 from one distillery or place of duty or from one collection district to another." This section is mandatory and binding upon every officer of the United States who comes within its terms, but it does not authorize the appointing power to make the changes proposed by the defendant collector. It is obvious, from the reading of that section, that it only authorizes the Commissioner to transfer the officers mentioned in it from one place of duty to another place of duty in the same district, or from one collection district to another. It does not in express terms say that you may transfer the officers mentioned in it from one position to another in the same distillery. It was evidently the intention of Congress, in the enactment of this clause of that section, to permit transfers as I have indicated; but there is no provision for the reducing of a man in the grade or position that he has held. Congress evidently supposed that if it became necessary to remove or reduce a man for incompetency to a lower position in the same grade, that the appointing power might exercise the power of removal; but since the passage of the civil-service act that power of removal is now limited and controlled by it, which, being a subsequent act to section 3154, so far as they are in

conflict with each other, limits and controls the Commissioner in his action. It is idle to say, as in the instance of Ruckman, in this case, that where he has held the position of "head or day storekeeper" that he can be changed or transferred from that position to that of "additional storekeeper," which is a change in rank, without nullifying the civil-service act and the rules in force under it. A transfer of this character from the "head or chief position" to a secondary position, as that of "additional storekeeper" necessarily must be, is a change of rank in a public position, which is necessarily a removal that can only be made under the civil-service act and the rules formulated under it. Can it be said that a transfer or assignment in the same distillery from one position to another does not operate as a removal from one position to the other?

Is not the position from which the officer is transferred vacated, and is he not placed in a new position? What can be the object and purpose of a transfer unless it is to remove the incumbent from the position he occupies? As we have before said, these officers held their positions before and at the time the present collector was appointed and entered upon the discharge of his duties on the 1st day of July, 1897. It is obvious from what appears in these cases that the present collector is attempting to secure a change in positions or a revocation of assignments of these officers, and to substitute others in lieu of them. If there were vacancies in these offices, of course he would have the right to make recommendations to the Commissioner to have persons appointed to fill the vacancies; but there are no vacancies, and none can be created except in the case of death or resignation or in conformity to the civil-service act and the rules promulgated under it. It has been held that an appointment to an office operates as a removal of the then incumbent. An office when once filled can not be deemed vacant until the term of service expires or until the death or removal or resignation or abandonment of the incumbent. (5 Waite's Act. & Def., sect. 14; Keenan v. Terry, 24 Texas, 253; Johnson v. Walker, 2 N. H., 202.)

By a provision of section 2, clause 2, of the civil-service act, their positions can only be filled by selection, according to grade, from amongst those graded highest as the result of competitive examination. It is true that by a provision of rule 9 certain exceptions are made to that rule, and it is claimed that these parties fall within the exception because they have heretofore held these positions and seek to be reinstated therein. If, however, there were vacancies, the appointments to fill the positions, to be legal, should be made in pursuance of section 2, clause 2, in connection with the exceptions contained in rule 9; but there is no pretense upon the part of the appointing power that they ever intended to comply with those provisions of the law. The effort to remove these officers seems to be in violation of the Executive order of July 27th, 1897, amendatory to civil-service rule 2, which provides that "no removal shall be made from any position subject to competitive examination except for just cause, upon written charges filed with the head of the Department or other appointing officer, of which the accused shall have full notice and an opportunity to make defense." The present incumbents hold positions of honor and trust, which positions, I hold, are within the provisions of the civil-service act and the rules formu-

lated and adopted in pursuance of it. If I am correct in this position, then these incumbents could only be removed in the manner provided for by that act and the Executive order of July 27th, 1897. It seems to me no grounds have been shown for their removal except "for the good of the public service." This is a reason that was employed by the officers of the Government when they desired to remove any one that was obnoxious to them long prior to the passage of the civil-service act. It is too general, vague, and indefinite to authorize the removal of an officer under existing law. By the very terms and provisions of the rule just referred to he has to be confronted with the charges that are made against him and to have full notice and an opportunity to make defense. No charges of a specific character have been preferred against these officers; no notice has been served upon them of any charge; and no opportunity has been furnished them to meet the vague and indefinite charge, "for the good of the public service." The very object and purpose of the rule which was promulgated on the 27th day of July, 1897, was to furnish a full opportunity to every officer who was within the civil service to meet any charges made against him. This has not been done in this instance, and I must hold that under the rules formulated by the President and the Civil Service Commission, and promulgated by that Executive order, that the effort to remove the officers in question is illegal. The rules promulgated by the President and the Commission are clearly within their scope and power under the act of Congress, and when they exercise the power to limit and restrict the power of removal as they deem best for the public interest, it is only the execution of a duty imposed upon them by Congress, and which should be effectually performed and fully complied with.

To my mind it is clear that storekeepers and gaugers are employes of the Government that are protected by the rules and regulations promulgated under the civil-service act by the Executive and the Commission; that a revocation of the assignments, or transfer of the plaintiffs in these actions, is in effect a removal, and that a removal for political reasons falls within the inhibition of the civil-service act and the rules promulgated under it; that there can be no appointment to any position unless there is a vacancy, and that the vacancy must be filled in conformity to the provisions of the civil-service act and the rules made under it.

The third ground of demurrer is that a court of equity can not enjoin an officer or party from exercising the power of removal.

I have heretofore discussed this question in the case of Priddie v. Thompson, United States marshal for this district, and although some of my brothers have differed with me in the conclusions I reached in that case, yet I have seen nothing emanating from them to shake my convictions. (Fed. Rep., Nov. 2, 1897.) In discussing a grave and important question of this character, it is well sometimes to have recourse to first principles. Story, who is a standard authority, says that "equity has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence where a plain, adequate, and complete remedy can not be had in the courts of common law." (1 Story Eq., 12 ed., sect. 33; 1 Cooper's Eq. Pl., 128, 129; Medford's Pl. in Eq., by Jeremy, 122, 123; 1 Wood's Lectures, 7, pp. 214, 215.)

"The remedy must be plain; for if it be doubtful and obscure at law, equity will assert jurisdiction. It must be adequate; for if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity." Accepting this definition as not only precise but descriptive of the powers of a court of equity, does not the case under consideration fall within the jurisdiction of such a court? In the bills filed in these cases it is alleged that the plaintiffs have not only an interest in, but a right to, the possession of the offices they hold, and their emoluments, and to that extent a vested right of which they cannot be deprived except by operation of law, and not by the capricious action of a superior officer. Has not a person who holds and is in pos'ession of an office to which there is a fair salary attached to remunerate him for his services a right to the protection of the law to prevent an injury to him by the doubtful assertion of the rights of another as to his office? Has he not a material interest in the possession of the office and the salary attached to it? If he has such an interest in the office and emoluments, is there not a right which should be recognized and protected by the law in the employment of it? The fact that another party desires and seeks
80 the office is evidence of its value to him, and if it is valuable to the one seeking it, surely it must be to the one holding it. If no value was attached to the position, there would be no occasion for these proceedings. The fact that they have been instituted to protect the incumbents in the enjoyment of their offices is conclusive evidence that there are some rights involved.

What, then, is the most complete remedy afforded? The plain answer to this question is that the only remedy that is adequate and complete must be of a preventive character, which seeks to restrain the defendants from ousting the plaintiffs from their positions. There can be no legal remedy, for the reason that the incumbents, when once ousted from their positions, have no recourse whatever. The plaintiffs are entitled to a preventive remedy to preserve the "status quo" until the titles to the different positions and offices can be settled by some legal proceeding. Equity alone furnishes that remedy, and if this remedy does not exist, then there is a case of an alleged wrong without a remedy. In the progress of a civilization that is giving us railroads, telegraphs, telephones, and numberless other things, all of which are regarded as necessary to both our business and social life, it often becomes necessary to invoke the latent powers of our jurisprudence as a necessity arises which requires it. This jurisdiction is only the application of existing powers in a court of equity to a new case. Courts of equity have exercised their jurisdiction permitting officers de facto of a school district to restrain persons claiming to be officers de jure, but are not in possession, from taking possession of a schoolhouse and from interfering with the officers de facto in the employment and management of school affairs. (Braidley v. Sweetland, 13 Ks., 41.) The question involved in these proceedings may be said to be analogous to the case just referred to. This injunction is to restrain the defendants from interfering with the plaintiffs in the possession of their offices, and is in no sense to try the right of possession or title to the offices. Proceedings by injunction cannot be used for that purpose. I think the foregoing views are clearly sustained by Story's Equity Jurisprudence. But I do not rely upon text-books alone to support my views

as to this position. In Waite's Actions and Defenses there will be found many references where courts of equity have exercised this jurisdiction where there was a controversy between parties claiming the same office. It will never be assumed to oust a person from an office under a color of title until his right to such office has been determined; but it will be exercised to protect a party in the possession of his office until he has been ousted by a legal proceeding. In a well-considered case by the supreme court of Louisiana it was held that an officer cannot be dispossessed by a third person whose title he disputes, until the latter shall first try the disputed right, and the learned judge who delivered the opinion of the court cites the case of Braidley v. Sweetland, 13 Ks., 41; Palmer v. Foley, 45 How. Pr., 110. The reason is very obvious that a claimant cannot take the law in his own hands, even with the assistance of others, to oust an incumbent in advance of judicial termination of the disputed right, and that court held that "the claimant and all others may be properly enjoined from interference with the party in possession of the office until the dispute can be judicially settled." (Guillotte v. Poyney, 5 L. R. A., 403.) In the case of Ex parte Sawyer (124 U. S., 402), Chief Justice Waite, referring to the remedy by injunction, uses the following language, which seems to support the view I have taken of the question under consideration: "I can easily conceive of circumstances under which a removal, even for a short period, would be productive of irremediable mischief. Such cases may rarely occur, and the propriety of such an application may not often be seen, but if one arises, and if the exercises of the jurisdiction can ever be proper, the proceedings of the court in due course upon a bill filed for such relief will not be void even though the grounds upon which it is asked may be insufficient." The law as thus laid down by the learned Chief Justice in the case cited would seem to dispose of the question under consideration.

In the case of Marbury v. Madison, 1 Cranch, 167, Chief Justice Marshall uses the following language: "But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy." Specific duties in the cases of these plaintiffs are assigned to them by law, viz, the duties of gauger and storekeepers. The "individual rights" or the rights of the owners of the distillery to which they have been assigned for duty depend to a great extent upon the faithful performance of their duties. They claim to have an "individual right" in the offices they respectively hold, and they conceive themselves to be injured in their rights when there is an effort to remove them from their positions. Under the authority of the cases cited, I hold that they have a right to resort to the courts of their country for a remedy. If they can not resort to the courts for a preventive remedy to stay the hand of the appointing power in removing them from their positions, then they have no remedy, although the act of the appointing power may be in violation of the civil-service act and the rules made under it. It can not be said that where Congress by its act has undertaken to limit and restrain the appointing power, and the appointing power attempts to nullify the plain provisions of the act, that there is no remedy.

High on Injunctions says that "the plaintiff says: 'I am the actual incumbent in possession of the office to which I claim to be legally entitled. Defendant, claiming under a title the validity of which I dispute, is seeking to oust me extrajudicially, in which effort he will have the aid of my fellow members on the board, and I ask judicial aid to protect my incumbency to the position until defendant shall, in due course of judicial procedure, establish his right and title. Such an action falls within a well-recognized branch of relief by injunction. While courts of equity uniformly refuse to interfere by the exercise of their preventive jurisdiction to determine questions relating to the title to office, they frequently recognize and protect the possession of officers de facto by refusing to interfere with their possession in behalf of adverse claimants, or, if necessary, by protecting such possession against the interference of such claimants, and the granting of an injunction in such a case in no manner determines the question of title involved, but merely goes to the protection of the present incumbents against the interference of claimants out of possession and whose title is not yet established.'" (2 High on Injunctions, 2 ed., sec. 1315.)

It is said by the learned judge who delivered the opinion of the supreme court of Louisiana, supra, that the doctrine as laid down by High "is in the interest of social peace and order and conforms to the object and policy of the law in all remedial provisions for the settlement of disputed rights, which always respect and maintain the status quo until the controversy shall be settled in the orderly course of judicial procedure." "Plaintiff," he says, "is undoubtedly the de facto officer, because he claims the office and is in possession of it, performing the duties under color of appointment." (Waite's Ac. & Def., page 7, paragraph 9; Buckman v. Ruggles, 15 Mass., 180; Commonwealth v. McCombs, 56 Pa., 436; State v. Howe, 25 Ohio St., 588; Braidey v. Therett, 17 Ks., 468.)

A recent work entitled American and English Decisions in Equity, vol. 3rd, page 440, lays down the principles and quotes the authority to sustain it: "* * * the actual incumbent of an office, whether de jure or de facto, if duly qualified, and in office by virtue of a certificate of election issued by the proper officers, will be protected by injunction against unlawful interferences with his possession thereof. (Brady vs. Sweetland, 13 Kas., 41; Braidy vs. Therett, 17 Kas., 468; Guillotte vs. Poicy, 41 La. An., 33; Palmer vs. Foley, 45 How. Pr. (N. Y.), 110; State vs. Superior Court of Snohomish Co. (Wash.), 48 Pacific Rep., 741; as by illegally electing another in his stead; Wheeler vs. Bd. of Fire Comrs., 46 La. An., 731; or by removing him without authority; Armitage vs. Fisher, 74 Hun. (N. Y.), 167. It will also sometimes interfere to protect the interests of the public, e. g., when two different bodies claim to act as the common council of a city; Kerr vs. Trego, 47 Pa., 292.")

The plaintiffs in these actions are all officers de facto if not de jure, claiming the possession of their offices and performing the duties under color of appointment. I therefore reach the conclusion that the plaintiffs have a right and interest involved in the offices they hold, and that that right and interest is questioned by the defendants in these cases, and that the only legal remedy they have to protect themselves in the enjoyment of their various offices as against those who are seeking to oust them is

the restraining power of this court to prevent interferences with their possession until the titles to the offices have been settled by due course of law. It follows from what I have said—

81 First. That the act known as the "civil-service act" is constitutional.

Second. That Congress has not delegated to the President and the Commission legislative powers.

Third. That by rule 3, section 1, the internal-revenue service has been placed under the civil-service act and rules made in pursuance of it.

Fourth. That the plaintiffs in these actions are officers of the Government in the internal-revenue service.

Fifth. That they can not be removed from their positions except for causes other than political, in which event their removal must be made under the terms and provisions of the civil-service act and the rules promulgated under it, which, under the act of Congress, became a part of the law.

Sixth. That the attempt to change the position and rank of the officers in these cases is in violation of law.

Seventh. That a court of equity has jurisdiction to restrain the appointing power from removing the officers from their positions if such removals are in violation of the civil-service act.

For the reasons assigned, the demurrers to the bills will be overruled.

I come now to consider the defense raised by the answers, other than the questions of law which were disposed of on the demurrers. The main question for consideration is a question of fact. The contention of the defendants is that they were not served with the injunction before the Commissioner had attempted to vacate the positions of gauger and storekeeper by the transfer or assignment of others to the positions of Ruckman, Butler, and Berry. From the answer of Collector White, as well as from his affidavit and the affidavits of the Commissioner, it appears that there was, for some reason, hasty action in regard to these officers. The action by the Commissioner was taken by him on the evening of September 30th, by wire, when he notified the plaintiff Ruckman of his transfer and the plaintiffs Butler and Berry of the revocation of their assignments. The collector claims that he was present on the morning of October 1st to execute the telegraphic order of the Commissioner. As we have before said, these plaintiffs, being officers of the Government, were not removable at the will or caprice of the Commissioner, and the Commissioner also being an officer of the Government, his action in this matter must conform to the law and not be in violation of it. The evidence does not show that the Commissioner sent any commissions to the defendants Thayer and Sutton, who were assigned to take, respectively, the offices of gauger and head storekeeper, before the time that they were served with the notice of the injunction restraining them from interfering with the possession of the incumbents. No officer in charge of an official position would be justified in turning over his position to his successor until that successor had appeared with his commission and taken the oath and given bond, as required by law. The evidence does not disclose that a single one of any of these prerequisites of the law had been complied with before the service of the injunction. It is very apparent that what was done in regard to these removals was done in haste. One thing is clear, both from the

answer and the affidavit of Collector White, that he does not deny the fact that he knew of the intended application for an injunction or that the injunctions had been allowed. This is a significant fact, tending to show either that he was very ignorant of what was going on, or that he carefully avoided committing himself either as to the application or the pendency of the injunction. But he must have known of the allowance of the injunction in the Butler case, which was allowed in term time, in open court, on the 29th day of September, and the evening of the very next day there was an attempt to transfer Ruckman and to revoke the assignment of Berry. It can not be doubted that he knew of the Butler injunction, for a copy of the process was left with his wife at his residence on the 29th day of September, as shown by the marshal's return; hence his attempt to have Ruckman transferred and Berry's assignment revoked before they secured injunctions, though he had recommended their appointments on the 27th to the Commissioner. If he knew of the allowance of the injunctions, he was bound to respect them as much as if he had been served with notice. Upon the question of notice and service of the order of injunction there is some conflict in the evidence. I will consider the evidence in the cases of Butler and Ruckman together, as the same affidavits apply to both cases. Ruckman, who was head storekeeper, swears that he did not surrender his possession; that at the time the injunction was served on White he was in possession of his office, discharging his duties; that he did not take upon himself and discharge the duties of additional storekeeper, the position held by Butler; that he only received notice of his transfer from head storekeeper to additional storekeeper at 10.55 a. m., October 2nd, 1897, and that this information was contained in a letter from the collector, mailed from Parkersburg at 4 p. m. of October 1st. He further states that Sutton admitted to him on the 1st day of October that he had received no authority from the defendant to act as storekeeper, and that the authority reached him on the morning of October 2nd. Ruckman could not have acted as additional storekeeper, for the reason that his assignment was cancelled by wire October 2nd, the same day that he received notice that Sutton was to take his place. Sutton was to take Ruckman's place and Ruckman was to take Butler's, but Ruckman's place was never vacant, or, if it was, he was directed by wire on the evening of October 2nd to remain in charge of the warehouse until further orders. It is apparent that Sutton never took possession of the warehouse, or, if he did, he was superseded by the order directing Ruckman to remain in charge, which, by its terms, shows that he was to continue in his position and not to vacate it.

Butler testifies that he was in the actual service of the Government at the time the injunction was served on White, and that Ruckman did not take his position nor did he (Ruckman) perform the duties of additional storekeeper, for the reason that he had been served with the order of injunction and declined to perform the duties of the office held by affiant. The deputy marshal says that the process was served on Ruckman on the evening of the 1st of October. Faulkner proves that Berry handed a letter to Ruckman on the morning of the 2nd of October, authorizing Ruckman to act as additional storekeeper. Ruckman swears that at the time of the service of the injunction in this case upon Sutton (who admits

that it was about 9 o'clock on the night of October 1st), he was performing and discharging the duties of head storekeeper at the distillery. The affidavits of White and Sutton contradict the sworn statements of Butler, Ruckman, Faulkner, and the deputy marshal. The weight of evidence as to the notice seems to be and is with the plaintiffs. It is unfortunate that this conflict should have occurred. One thing is evident: That Butler has never surrendered his position, and, so far as the defendant Ruckman is concerned (who does not claim it, but who insists upon his right to hold the position of head storekeeper), Butler holds his position adverse to Ruckman.

In the case of Berry, gauger, the same character of conflicting evidence exists as in the cases just passed upon. Berry denies that Thayer entered upon the duties of gauger on the 1st day of October, but swears that he was in possession of the property as gauger. Berry states that on October 2nd, 1897, Thayer came out to the distillery and, after asking him if he was the gauger in charge, showed him a telegram purporting to come from the Commissioner of Internal Revenue, assigning him as gauger at said distillery. This affidavit is supported by the affidavits of Faulkner and McMahan. It is contradicted by White and Thayer as to the time when Thayer took possession of the office and as to the time of the service of the injunction. The marshal testifies that they were served the evening of October the 1st with a copy of the injunction. Faulkner and McMahan sustain Berry as to what occurred on the morning of the 2nd day of October, from which it clearly appears that Thayer came that morning to take possession of the office. The only two disinterested witnesses to all of these occurrences, and particularly as to the time of the service of notice, are Faulkner and McMahan. Both of these witnesses sustain Ruckman, Butler, and Berry. The affidavits of both White and Thayer say they were at the distillery on October 1st, and that Berry was not there and could not therefore turn over the possession of any Government property in his charge to Thayer. But White says there was no Government property to turn over. The Commissioner required him to turn it over, but the collector says there was none to turn over. By reference to the "Regulations and Instructions Concerning the Tax on Distilled Spirits," under the Revised Statutes of the United States, and subsequent acts, issued February 19th, 1895 (pages
14 and 15), the act says: "That gaugers are made custodians of
82 cistern rooms, and that under no circumstances will they entrust
the key to the lock on the door of the receiving room to any person other than the collector of the district." A pertinent question arises: Did Berry turn the keys of the cistern room over to Thayer? It is not claimed that he did, but, on the contrary, Berry states that "on the 2nd day of October I was still in the possession of the property of the Government, as well as the keys, which, as such gauger, it is my duty to hold," which contradicts the statements of Thayer and White as to the possession of the office.

Another pertinent question is, What became of the gauger's outfit, consisting of box containing hydrometer cups, hydrometer, and stems, with which each gauger is supplied, which is the property of the Government? The law says, "Standard hydrometers are supplied for the use of internal-revenue gaugers, at the expense of the Government."

(Regulations and Instructions Concerning Tax on Distilled Spirits, p. 123.) Did Berry have any distillery stamps and did he turn over any to Thayer? (Same, page 14.) I might refer to other things to show that every gauger is in possession of property of the Government, and when he is removed must turn it over to his successor in office. No outfit was turned over to Thayer, which shows that possession was not surrendered by Berry to Collector White or Thayer. It is apparent that Collector White is at least under a great misapprehension as to what is the outfit of a gauger, when he says in his affidavit of October 19th, 1897, "that Berry had no property in his possession to turn over to the defendant Thayer to complete Thayer's assignment." He may entertain honestly that conviction, but I must hold that it is a mistaken conviction and does not accord with the statutes cited supra.

I reach the conclusion that the preponderance of evidence is with the plaintiffs, and that neither the gauger nor storekeepers have ever vacated or surrendered their offices or positions; that in contemplation of law they are in the legal custody of their offices and can only be displaced by proceedings instituted under the Executive order of July 27th, 1897; that the offices not having been surrendered and the injunction being served while plaintiffs were in possession, it was effective to prevent the interference of the defendants with the plaintiffs in the possession of their offices.

I deem it unnecessary to discuss the competency of the plaintiffs for their positions, though the evidence tends strongly to show that they were fully competent, having served in those positions since 1893.

One other position of the plaintiffs remains to be noticed, and that is that under the legislative and judicial act of 1885, reenacted in 1886, the collector is prohibited from recommending to the Secretary of the Treasury for appointment more officers of this class than fifteen per cent in excess of the number engaged in performing the duties at the time. It is very clear from the affidavit of Ruckman that the act has been violated, but it is not necessary to rest the case upon this position.

I think that both the law and the facts are with the plaintiffs, and the injunction heretofore awarded must be made perpetual.

(Endorsed:) Filed Nov. 8th, 1897. L. B. Dellicker, clerk.

83 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order perpetuating injunction.—Entered November 8, 1897.

J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

This cause came on to be further heard this 8th day of November, 1897, upon the bill, demurrer to bill, joinder in said demurrer, the answer by the defendants, general replication to said answer, affidavits filed therein, and upon the motion of the plaintiff to perpetuate the injunction heretofore awarded; upon consideration whereof, the court

is of opinion to perpetuate the injunction and to make the same absolute, restraining and inhibiting the defendant A. B. White, the collector of this district, the appointing power, and the defendant Sutton and all others from in any wise interfering with the plaintiff, J. G. Ruckman, in the possession of his office as head storekeeper, and in the discharge of his duties as such storekeeper at the Hannis distillery, located in the town of Martinsburgh, W. Va., until he shall be removed by proper proceedings under the civil-service law, and the rules and regulations made in pursuance thereof, or by judicial proceedings at law; and the said collector having heretofore applied to the court for leave to appoint temporarily a storekeeper, pending this litigation, he, the said collector, is required and directed to discharge such temporary storekeeper, if appointed under said order, and to permit the said J. G. Ruckman, undisturbed to discharge the duties of his office as head storekeeper, unless hereafter removed as hereinbefore provided.

And the counsel for the defendant having requested the court to grant an appeal in this case, this order is suspended for the period of
84 ten days to allow them to file their petition and assignment of error and give bond for the perfection of the appeal, and the opinion filed by the judge of this court is ordered to be made a part of this record.

Enter.

JACKSON, *Judge.*

NOV. 8, 1897.

85 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Petition for appeal.—Filed Nov. 17, 1897.

In the circuit court of the United States for the district of West Virginia.

J. G. RUCKMAN, PLAINTIFF, APPELLEE,
vs.
A. B. WHITE, COLLECTOR OF INTERNAL REVENUE for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin T. Thayer, defendants, appellants. } In equity.

The above-named defendants, conceiving themselves to be aggrieved by the order entered on the 8th day of November, 1897, in the above-entitled cause, do hereby appeal from said order to the Supreme Court of the United States, and they pray that this their appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

JOSEPH H. GAINES,
Attorney for the Defendants.

CHARLESTON, WEST VIRGINIA, *Nov. 16th, 1897.*

And now, to wit, on November 16th, 1897, it is ordered that the above appeal be allowed as prayed for.

J. J. JACKSON,
United States District Judge, District of West Virginia.

(Endorsed:) Filed November 17, 1897. L. B. Dellicker, clerk.

86 J. G. RUCKMAN,
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Assignment of errors.—Filed Nov. 17, 1897.

In the circuit court of the United States for the district of West Virginia.

J. G. RUCKMAN, APPELLEE,
vs.
A. B. WHITE, COLLECTOR, ETC., ET AL., APPELLANTS. } In equity.

Assignment of errors.

And now, on the seventeenth day of November, in the year of our Lord one thousand eight hundred and ninety-seven, come the above-named appellants and file with their petition for allowance of appeal to the Supreme Court of the United States this their assignment of errors, and say that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit:

I.

That the allegations of plaintiff's bill do not show a proper case for the granting of an injunction.

II.

That the demurrer of defendants should have been sustained and the bill dismissed.

III.

That the act of Congress of the day of , 1883, known as the civil-service law, and the several Executive orders, rules, and regulations made in pursuance thereof, are unconstitutional and should have been so held. A court can not enjoin the removal from office of one holding an inferior appointive office, nor in any manner control such removal.

87 IV.

A court can not enjoin an appointment to an inferior appointive office, or otherwise control such appointment.

V.

The power to appoint to and remove from the inferior appointive offices of the Government belongs exclusively to the executive department of the Government, and is not subject to any kind of intervention or control by the judiciary.

VI.

The civil-service law, if constitutional, does not give even to these officers within its provisions any right to resort to the courts to prevent their removal, or to hold them in office after removal by the proper executive authority, having power to appoint and remove, pending the determination of a question whether such removal was in contravention of the civil-service law.

VII.

Even if the civil-service law is constitutional and in any case has been violated, the remedy, if any, is executive and administrative, not judicial.

VIII.

That assignment to duty and the revocation of such assignment of storekeepers and *gua*gers are not affected by the civil-service law.

IX.

That the power to make such assignments and to revoke them instantly, and at the will of the Commissioner of Internal Revenue, is a power essential to the best interests and even to the honest administration of the revenue service.

X.

That revocation of assignment of storekeepers and *gua*gers is not a removal from office; and no attempt to remove the plaintiff from office has been made.

88

XI.

That the record shows that the Commissioner of Internal Revenue, who made the assignment and the revocation complained of, did not do so for political reasons, but for the good of the service, and the court should have so found, and should have refused the injunction.

XII.

That the record shows that the revocation and assignment complained of were made, and the defendant John D. Sutton substituted in place of plaintiff before the service or other notice of the temporary order of injunction; and the court should have so held, and should have refused the injunction.

XIII.

That the honorable circuit court of the United States for the district of West Virginia, on the whole record, should have refused the injunction and dismissed the defendants.

Wherefore the said defendants and appellants pray that the decree and order of injunction of the said circuit court of the United States for the district of West Virginia may be reversed and dismissed.

JOSEPH H. GAINES,
Attorney for Appellants.

Charleston, West Virginia.

(Endorsed:) Filed Nov. 17th, 1897. L. B. Dellicker, clerk.

89 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Appeal bond.—Filed November 18, 1897.

Know all men by these presents, that we, A. B. White, of the city of Parkersburg, in the State of West Virginia, as principal, and L. M. La Follette and M. A. Kendall, as sureties, are held and firmly bound unto J. G. Ruckman in the full and just sum of five hundred dollars, to be paid to the said J. G. Ruckman, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 18th day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a circuit court of the United States for the district of West Virginia, sitting at Martinsburg, in said district, in a suit depending in said court between J. G. Ruckman, plaintiff, and A. B. White, collector of internal revenue for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin T. Thayer, a decree was rendered against the said A. B. White, collector of internal revenue for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin T. Thayer, and the said A. B. White, collector of internal revenue for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin T. Thayer having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said J. G. Ruckman, citing admonishing him to be and appear at a Supreme Court of the United States, to be holden at the city of Washington on the day in the said citation mentioned:

90 Now, the condition of the above obligation is such that if the said A. B. White, collector of internal revenue for the district of West Virginia, A. L. Hoult, John D. Sutton, Anthony Staubley, and Franklin T. Thayer shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

A. B. WHITE. [SEAL.]
L. M. LA FOLLETTE. [SEAL.]
M. A. KENDALL. [SEAL.]

Sealed and delivered in presence of—
L. B. DELLICKER.
L. B. DELLICKER.
L. B. DELLICKER.

Approved by—

J. J. JACKSON,
U. S. Dist. Judge.

Nov. 18, '97.

(Endorsed:) Filed November 18th, 1897. L. B. Dellicker, clerk.

91 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Citation.—Filed Nov. 22d, 1897.

UNITED STATES OF AMERICA, ss:

The President of the United States of America to J. G. Ruckman, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington, D. C., on the 18th day of December, eighteen hundred and ninety-seven, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the district of West Virginia, wherein A. B. White, collector of internal revenue for the district of West Virginia, A. L. Holt, John D. Sutton, Anthony Staubley, and Franklin T. Thayer are defendants and appellants, and J. G. Ruckman is plaintiff and appellee, to show cause, if any there be, why the judgment of the circuit court of the United States in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties on that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 18 day of November, in the year of our Lord one thousand eight hundred and ninety-seven.

J. J. JACKSON,
U. S. District Judge.

J. G. RUCKMAN
v.
A. B. WHITE, COLLECTOR, &C. } Citation.

Service of the within writ acknowledged.

J. G. RUCKMAN,
By FRANKLIN & WALKER,
His Attorneys.

Nov. 22d, '97.

Filed Nov. 22d, 1897. L. B. Dellicker, clerk.

92 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Order for transcript of record and proceedings.

And thereupon it is ordered by the court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Supreme Court; and the same is transmitted accordingly.

Test:

L. B. DELLICKER, *Clerk.*

93 J. G. RUCKMAN
vs.
A. B. WHITE, COLLECTOR, ET AL. } In equity.

Clerk's certificate.

I, L. B. Dellicker, clerk of the circuit court of the United States for the district of West Virginia, do certify that the foregoing record is a true, full, and correct transcript of the record and proceedings had in the above-entitled cause, together with all things thereunto relating, as the same appear upon the files of my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Martinsburg, at said district, this 11th day of December, A. D. 1897.

[SEAL.] L. B. DELLICKER, *Clerk.*

(Indorsement on cover:) Case No. 16754. West Virginia, C. C. U. S. Term No., 541. A. B. White, collector of internal revenue for the district of West Virginia et al., appellants, vs. J. G. Ruckman. Filed December 18, 1897. Office Supreme Court of U. S. Received Dec. 18, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

A. B. WHITE, COLLECTOR OF INTERNAL Revenue, et al., appellants, *v.* H. C. BERRY.	No. 539.
SAME *v.* WILLIAM BUTLER.	No. 540.
SAME *v.* J. G. RUCKMAN.	No. 541.

MOTION TO ADVANCE.

Now comes the Solicitor-General in behalf of the appellants and moves the court to advance these cases upon the docket and set them down for hearing at the present term, for the following reasons:

First. The three cases involve substantially the same question and will be argued together. The importance of an early decision in these cases is set forth by letter

from the Commissioner of Internal Revenue of which the following is a copy:

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER
OF INTERNAL REVENUE,
Washington, D. C., January 27, 1898.

To the honorable the
SECRETARY OF THE TREASURY.

SIR: There are three cases now pending in the Supreme Court of the United States, appeals from the circuit court of the United States for the district of West Virginia. The cases are A. B. White, collector of internal revenue for the district of West Virginia et al., appellants, against H. C. Berry; the same against William Butler; the same against J. G. Ruckman, being numbered respectively 539, 540, and 541 on the docket of the Supreme Court.

These cases involve the question of the right of the Commissioner of Internal Revenue under the statutes to relieve, transfer, and assign internal-revenue gaugers, internal-revenue storekeepers, and other subordinate officers of the internal-revenue service in the discharge of their duties as such internal-revenue officers in the respective internal-revenue districts throughout the country.

These cases are based upon orders of the Commissioner of Internal Revenue relieving certain storekeepers and gaugers in the district of West Virginia at distillery warehouses, and assigning other storekeepers and gaugers to duty in their places at said warehouses. Thereupon the district judge sitting in the circuit court of West Virginia has issued a perpetual injunction against the collector and others enjoining the operation of said orders of the Commissioner of Internal Revenue.

It is of the utmost importance that the rights of the Commissioner and his duty under the circumstances, and also of the collector in this matter, be passed upon, and determined definitely, by the Supreme Court at the earliest possible moment.

Respectfully, yours, N. B. SCOTT,
Commissioner.

[Indorsement.]

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
January 27, 1898.

Respectfully referred to the Honorable Attorney-General with the request that for the reason given this case be heard at the earliest practicable time.

L. J. GAGE, *Secretary.*

Second. The cases involve the construction of sections 3154 and 3163 of the Revised Statutes, and the powers and duties of the Commissioner of Internal Revenue with respect to the transfer and assignment of internal-revenue storekeepers and gaugers; and further, the effects of the act of 1883, known as the civil-service act, and the Executive orders from time to time made and issued thereunder, upon the duties of the Commissioner of Internal Revenue under the said sections, and also as to whether the courts of the United States can by injunction restrain the collectors of internal revenue in the various districts, or the Commissioner of Internal Revenue acting through the collectors, from relieving from duty storekeepers and gaugers, or from assigning these officers to duty or transferring them from one place of duty to another.

Counsel for appellees have filed a written consent to the granting of this motion.

JOHN K. RICHARDS,
Solicitor-General.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

H. C. BERRY *v.* A. B. WHITE, COLLECTOR OF internal revenue, et al.	In equity. No. 539.
WILLIAM BUTLER *v.* SAME.	No. 540.
J. G. RUCKMAN *v.* SAME.	No. 541.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

BRIEF OF APPELLANTS.

STATEMENT.

These are suits in equity to enjoin assignments and revocations of assignment of storekeepers and gaugers in the Internal-Revenue Service of the Government.

At the time of filing the bills the defendant A. B. White was collector of internal revenue for the collection district of West Virginia, and still holds said office. The plaintiffs were all officers of the United States in the Internal-Revenue Service and under assignment of duty at the Hannis distillery at Martinsburg, W. Va. J. G. Ruckman was day storekeeper, William Butler was additional storekeeper, and H. C. Berry was gauger. The defendants Hault, Sutton, Staubly, and Thayer were officers in the Internal-Revenue Service before the institution of these suits, the said Hault and Thayer as gaugers and the said Sutton and Staubly as storekeepers, and all subject to assignment to duty by the Commissioner of Internal Revenue. These facts appear from the bill and answer, and are not disputed.

On the 30th day of September, 1897, the Commissioner of Internal Revenue—at that time the Hon. W. S. Forman—who is the officer authorized by law to assign storekeepers and gaugers to duty and to revoke such assignments, telegraphed and wrote to the defendant John D. Sutton, notifying him that he was assigned for day service to Hannis Distillery Company, vice Ruckman, assigned for additional service, to be effective on the following morning—that is, on the morning of October 1. And by letter, dated September 30, 1897, the Commissioner notified plaintiff Ruckman that he was assigned as additional storekeeper at said distillery, to take effect October 1, 1897. (See Ruckman record, 21 and 22.) It will be observed that this was a revocation of the assignment of said Ruckman as day storekeeper and an assignment

of him to the position of additional storekeeper, and that his compensation remained the same, to wit, $4 per day for the time actually employed.

On the 30th day of September, 1897, the Commissioner notified plaintiff Berry by telegram that he was relieved from duty as gauger at said distillery, and directing him to turn over all Government property in his possession to defendant Franklin T. Thayer, who had been directed to relieve said Berry from duty on the 1st of October, 1897; and on the 2d of October, 1897, the Commissioner suspended said Berry from duty as a gauger. (See Berry record, 23 and 24.)

On the 30th day of September, 1897, the Commissioner, by telegram, notified the plaintiff, William Butler, that his assignment as additional storekeeper at said distillery was thereby revoked, said revocation to be effective at the close of business on that day. And on the 30th day of September, 1897, the defendant, A. B. White, was notified by the Commissioner of the foregoing changes in assignment of storekeepers and gaugers within his collection district. (See Ruckman record, 22 and 23.)

The defendants were not dismissed from the service. Ruckman was relieved from assignment and reassigned, Berry was relieved from assignment, and Butler was relieved from assignment September 30 and suspended October 2. The defendants all remained officers and subject to reassignment by the Commissioner of Internal Revenue.

The bills in these cases were filed in the circuit court of the United States on the 1st day of October, 1897.

They set out the official positions of the plaintiffs, and their assignment to duty, and the official position of the defendant, A. B. White, collector. They allege that the plaintiffs are competent; that they desire to continue undisturbed in their several assignments; that they are Democrats and the collector is a Republican; that the collector is about to remove them from their several offices and place in their stead the other defendants, for no other reason than that the plaintiffs are Democrats and the collector and the other defendants Republicans; that to do this would be a violation of the civil-service law and the rules and regulations thereunder; and pray for an injunction restraining and inhibiting "the said A. B. White, collector, as aforesaid, and all others by and through him, from removing" plaintiffs from their positions "until a vacancy is created by law, and from recommending, assigning, and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfering with" complainants; and for general relief. (See Ruckman record, 4.)

The answers admit that the plaintiffs are officers in the Internal-Revenue Service, and that before the 1st of October, 1897, they were assigned to duty at said distillery, as set out in the bills. The answers aver that the collector does not have power to remove the defendants from the service or to revoke their assignments, and has not assumed to exercise such power; that the Secretary of the Treasury alone has the power to appoint and remove complainants, and the Commissioner alone has the power to revoke their assignments; that complainants

had not been removed from the service, and that no attempt had been made so to remove them; that the assignments and revocations of assignment complained of were made by the Commissioner of Internal Revenue, and that neither the said assignments or revocations nor the recommendation of the collector to the Commissioner relative thereto were made for political or religious reasons, but for the good of the service; that the said Commissioner was a Democrat; that the defendants Hault, Sutton, Staubly, and Thayer had been duly and lawfully appointed by the Secretary of the Treasury and had qualified as officers in the revenue service long before these suits were instituted, and that they are competent to perform the duties to which they were assigned; that the civil-service law had not been violated, and that no attempt to violate said law had been made by either the Commissioner or the collector. (See Ruckman record, 11–16.) In the case of Berry his efficiency is denied, and it is alleged that he is a "careless and indifferent officer." (See Berry record, page 12, sec. 4.)

There is in each record a restraining order dated the 29th day of September, 1897; but as the bills were not sworn to until the 30th of September and were filed in open court on October 1, we take it that these orders may be disregarded. (See Ruckman record, 6.)

A restraining order was entered in each case October 1, enjoining the defendant A. B. White, collector—

> From recommending, appointing, or assisting in the appointment of A. L. Hault, John D. Sutton, Anthony Staubly, and Frank T. Thayer, or any other person to said position, and from removing the

said complainant ——— ———, as aforesaid, until a vacancy therein is created by law, and from assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal and in any other manner interfere with the said complainant ——— ——— in the said office, as aforesaid,

It is further ordered, adjudged, and decreed that A. L. Hault, John D. Sutton, Anthony Staubly, and Frank T. Thayer, and all other persons be, and they are hereby, enjoined and prohibited from acting as storekeeper [or gauger] in the place and stead of the said complainant as aforesaid, or in discharging any of the duties of said office until the further order of this court. (See Ruckman record, 10.)

On November 8 the court entered orders perpetuating the injunctions as follows:

Restraining and inhibiting the defendant, A. B. White, the collector of this district, the appointing power, and the defendant ——— ———, and all others from in anywise interfering with the plaintiff ——— ——— in the possession of his office as ——— and in the discharge of his duties as such ——— at the Hannis distillery, located in the town of Martinsburg, W. Va., until he shall be removed by proper proceedings under the civil-service law and the rules and regulations made in pursuance thereof, or by judicial proceedings at law. (See Ruckman record, 55.)

POINTS AND ARGUMENTS.

These cases involve the construction of the act of Congress of January 16, 1883, known as the civil-service act and the executive rules and regulations made in pursuance thereof, with special reference to the power of the

courts, at the suit of a removed officer, to control the exercise of executive discretion in making appointments and removals, and the additional question whether the revocation of assignment to duty of storekeepers and gaugers in the internal-revenue service is within the operation of the act.

It is respectfully submitted that the honorable circuit court had no jurisdiction to entertain the bill and grant the relief prayed for. In *ex parte Sawyer* (124 U. S., 200), Mr. Justice Gray, delivering the opinion of the court, says:

> It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is entrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law and is exercised either by certiorari, error, or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure established by common law or by statute.
>
> No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. But an information in the court of chancery for the regulation of Harrow School within its undoubted jurisdiction over public charities was dismissed so far as it sought a removal of governors unlawfully elected, Sir William Grant saying, "This court, I apprehend, has no jurisdiction with regard either to the election or amotion of corporators of any description" (citing there *Attorney-General* v. *Clarendon*, 17 Ves. Jr., 491, 498).

> In the courts of the several States the power of a court of equity to restrain by injunction the removal of a municipal officer has been denied in many well-considered cases.

The court cites decisions of the courts of New York, Pennsylvania, Iowa, Illinois, and other States to the same effect in the Sawyer case, and then cites with approval the following language from Kerr on Injunctions:

> It is elementary law that the subject-matter of the jurisdiction of a court of chancery is civil property. The court is conversant only with questions of property and the maintenance of civil rights. Injury to property, whether actual or prospective, is the foundation on which the jurisdiction rests. The court has no jurisdiction in matters merely criminal or merely moral which do not affect any right to property, nor do matters of a political nature come within the jurisdiction of a court of chancery. Nor has the court of chancery jurisdiction to interfere with the duties of any department of government, except under special circumstances and when necessary for the protection of rights of property.

And also:

> The office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of the rights of property. It has no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors, or over the appointment and removal of public officers.

It is worthy of note that in the entire history of this Government no single case is to be found where an appointment to or a removal from an appointive office under the executive branch of the Government has been

enjoined, although many persons have been removed from office against their will. And during the fifteen years since the enactment of the civil-service law no case can be found where the jurisdiction contended for in these cases has been upheld, except within the last year in the district of West Virginia. It is not contended that the plaintiffs held their positions as storekeepers and guager, much less their particular assignment to duty at a given time and a particular distillery, by any tenure. It is submitted that there is no property right in or title to any office unless held by a fixed and definite tenure.

That there is no title to an appointive office under the Government or vested right thereto is fully set out in the case of *Parsons* v. *The United States* (167 U. S., 324.) That was a case where the district attorney for the northern district of Alabama was removed from office by President Cleveland in 1893; and, notwithstanding the fact that the commission of the district attorney provided "that he should hold said office, with all the powers, privileges, and emoluments to the same of right pertaining unto him, the said ——— ———, for the term of four years from the date hereof, subject to the conditions prescribed by law," and that the statute provides that "district attorneys shall be appointed for the term of four years," it was held that a district attorney has no such title to his office or vested property right therein that he could recover the salary for the unexpired term.

If any tenure exists in the inferior appointive offices of the Government, it would seem to be a life tenure; and certainly if it had been the intention of the Congress to establish such tenure by the civil-service law it would

have been specifically provided in the act. No such far-reaching consequence would have been left to inference.

It is well settled that the power of appointment carries with it the power of removal. (*Hennen's Case*, 13 Pet., 230.) It was constantly denied in the discussion in Congress which led to the passage of the civil-service act that that act took away from the executive department of the Government either the power of appointment or the power of removal. (See Congressional Record, vol. 13, part 1, and vol. 14, part 1.) The Constitution, Article II, section 2, provides that "the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments."

In the discussion of the act it was constantly recognized that Congress had not the power to vest the appointment of inferior officers in a commission, or otherwise than as provided in the Constitution.

As to the power of appointment, it was claimed that limiting the power of selection to such persons as were certified to the President and heads of departments by a commission did not limit the power conferred upon the executive department of the Government by the Constitution, though that position was vigorously denied by many able constitutional lawyers in both branches of Congress. Throughout the discussion it was conceded that the power of removal was constitutional, and could not be limited or taken away by act of Congress; and it was universally conceded that it was not the object of the bill to interfere in the slightest degree with the power of removal of inferior officers.

Mr. Pendleton, who introduced the bill, in his first and principal speech, advocating and explaining his measure to the Senate, on page 81, volume 13, part 1, of the Congressional Record, says:

> "The framers of the bill provoke no conflict with the constitutional power of removal from office. They avoid the delicate and difficult question of the duration of official terms. * * * They wisely thought that if every future vacancy should be filled by the appointment of the one man, in fact, the best fitted to discharge the duties, all other questions would soon settle themselves; that if no amount of pressure or patronage, however great, could avail to put a favorite into a vacancy, little wrongful pressure or patronage would be used to make a vacancy.

Again he says, page 82, in the same volume of the record:

> I have sufficiently indicated the constitutional difficulty which may arise and the wisdom of avoiding it. * * * Removals are rarely asked for under the spoils system except to make a vacancy for a particular man. If another man is to be put in, especially if the other man be the favorite of nobody, be recommended by nobody, be the partisan servitor of no person and no party, if he be simply the most capable and fit man for the place, demands for removal will be made only for cause, and then the demand should be heeded. Under the merit system of appointment the question of removal will be solved without legislation.

And again, on the same page, Mr. Pendleton says:

> Many very ardent friends of civil-service reform are opposed to what they call the establishment of

> an official class among the people. They advocate a fixed term for all officers. * * * For the present, without expressing any opinion or committing its supporters in any degree, this bill leaves the subject untouched.

This position was recognized by Bradley, judge, in the case of *Gaddis* v. ——— (Thirteenth Report of U. S. Civil Service Commission, p. 49), where it is said:

> Although apparently it has become a difficult thing to get into the civil service, yet it is just as easy to get out as it was before the enactment of the law. To the extent that the spoils system has been abolished by the civil-service law, it is a great benefit to the civil service. To the extent, however, that Congress failed to provide for the tenure of office of appointees under the civil-service law, it appears to me that the purposes of the act are clearly abortive. Whatever may be my opinion as to the competency of the relator to fill the position that he occupied, or my opinion as to the insufficiency, inadequacy, impropriety, and lack of public policy of the reasons that were given for his removal, it is perfectly clear to me that this court is without authority to interfere in this case.

The courts can not intervene by injunction or otherwise to control executive discretion in appointments to office and removals from office. It was claimed by counsel in the argument in this case, and by the learned judge who delivered the opinion, that this proceeding did not undertake to control executive discretion. Yet the restraining order enjoins the collector from even making the recommendations to his superior officers in the Treasury Department, which he is required by law to

make, and the order perpetuating the injunction restrains and inhibits "the defendant White, the collector of this district, the appointing power, and the defendant and all others from in any wise interfering with the plaintiff in the possession of his office and in the discharge of his duty at the Hannis distillery, located in the town of Martinsburg, West Virginia, until he shall be removed therefrom by proper proceedings had under the civil-service act and the rules and regulations made thereunder, or by judicial proceedings at law."

Under the law the Secretary of the Treasury appoints storekeepers and gaugers, and the Commissioner of Internal Revenue assigns them to particular duties. The language of the order perpetuating the injunction, therefore, is a direct attempt to control the Secretary of the Treasury in the exercise of his discretion in appointment to and removal from office, and is broad enough to prevent the Commissioner of Internal Revenue from exercising the discretion with which he is charged by law in assigning storekeepers and gaugers to duty, and in revoking such assignments. The result of such a ruling is to deprive the President and his Cabinet officers of power to control the course of business in the Executive Departments of the Government.

Congress, while undertaking by the civil-service law to limit the power of appointment to the classified service to an eligible list to be certified by the Civil Service Commission wisely left the power of removal untrammeled, so that the executive department of the Government, charged with the responsibility of the acts of its subordinate officers, could immediately at will relieve

the public service from embarrassments and danger on account of an incompetent, dishonest, or insubordinate official.

But if the ruling contended for in these cases should be upheld, then no matter how incompetent or even dishonest any official might be whose office is within the classified civil service, the President or the proper head of a department could not secure his removal except after a long litigation in the courts, pending which, if the incompetent or dishonest official chose to resort to a proceeding similar to the present cases, he must be left, no matter how great the danger to the public service, in the undisturbed possession of the office, or the President and heads of departments must be in contempt of the court. The result will be serious detriment to the public service, and frequent collisions between the Executive and Judicial Departments of the Government.

In *State of Mississippi* v. *Andrew Johnson* (4 Wallace, 475) Mr. Chief Justice Chase, delivering the opinion of the court, says:

> The Congress is the Legislative Department of the Government; the President is the Executive Department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are in proper cases subject to its cognizance.

In the case of the United States ex rel. *Boynton* v. *Blaine*, Secretary of State (139 U. S., 306 to 326), Mr. Chief Justice Fuller, delivering the opinion of the court, says:

> The writ of mandamus can not issue in a case where its effect is to direct or control the head of

an executive department in the discharge of an executive duty involving the exercise of judgment or discretion. (See also *United States* v. *Windom*, 137 U. S., 636 to 644.)

The rule above laid down has not been limited to the President and heads of departments.

In the case of *United States* v. *Seaman* (58 U. S., 225 to 231) it is said:

> The power of the circuit court of this district to issue writs of mandamus to an officer of the Government in Washington has frequently been the subject of discussion in this court. It was before the court in *Kendall* v. *United States*, 12 Peters, 524; in *Decatur* v. *Paulding*, 14 Peters, 497; in *Brashear* v. *Mason*, 6 Howard, 92; and again in *Goodrich* v. *Guthrie*, at the present term. The rule to be gathered from all of these cases is too well settled to need further discussion. It can not issue in a case wherein discretion and judgment are to be exercised by the officer, and it can be granted only where the act required to be done is merely ministerial, and the relator without any other adequate remedy. (See also *Cox, Secretary of the Interior* v. *McGarahan*, 76 U. S., 298.)

While the bills in these cases allege that the collector is about to remove the plaintiffs from their positions, the statutes relative to the appointments and assignments of storekeepers and gaugers in the internal-revenue service show that the collector is not vested by law with such power, but that the Secretary of the Treasury alone has the power to appoint such officers and the Commissioner of Internal Revenue alone has power to assign them to duty. Section 3153 of the Revised Statutes provides

that "There shall be appointed by the Secretary of the Treasury such number of internal-revenue storekeepers as may be necessary, who shall each receive such compensation, not exceeding $4 per day, to be paid monthly by the United States, as may be determined by the Commissioner of Internal Revenue." Section 3156 of the Revised Statutes provides that "The Secretary of the Treasury shall appoint in every collection district where they may be necessary one or more internal-revenue gaugers," etc.

The Revised Statutes also provide that one or more storekeepers shall be assigned by the Commissioner of Internal Revenue to every bonded or distillery warehouse established by law; that any storekeeper may be transferred by the Commissioner of Internal Revenue from one warehouse to another; that the Commissioner may also transfer any inspector, gauger, or storekeeper from one distillery or other place of duty, or from one collection district to another; and require every collector within his collection district to "see that all laws and regulations relating to the collection of internal taxes are faithfully executed and complied with, * * * and to report to the Commissioner in writing any neglect of duty, incompetency, delinquency, or malfeasance in office of any internal-revenue officer or agent of which he may obtain knowledge." (See Revised Statutes, sections 3154, 3156, 3163.)

When, therefore, the injunction orders in these cases enjoined the "appointing power" they enjoin the Secretary of the Treasury in the exercise of his discretion. In

so far as they restrain the assignments and revocations of assignments complained of they enjoin the Commissioner of Internal Revenue from the exercise of his discretion.

The statutes and the regulations and instructions of the Treasury Department (see series 7, number 7, revised February 19, 1895, pp. 35, 41) require collectors to have general charge of storekeepers and gaugers within their respective districts; to see that they perform their duties, and to recommend to the Commissioner of Internal Revenue storekeepers and gaugers for assignments to particular duty. These injunction orders seek to control the exercise of the discretion so required of the collector by statute and departmental regulations, and to compel him either to make certain recommendations and to refrain from making certain other recommendations, or from making any recommendations to the Commissioner.

It is clearly the intention of the statutes relating to the storekeepers and gaugers and the regulations of the Treasury Department in reference thereto to give to the Secretary of the Treasury, the Commissioner of Internal Revenue, and the collector, within their respective spheres, complete control of such officers. The gaugers and storekeepers at distilleries perform a duty which affects, on the one hand, large private interests, and on the other a large portion of the public revenues. The power to assign these officers to duty and to revoke their assignments at will is a necessary power in order to prevent collusion between the storekeepers and gaugers and the owners of the distilleries. This power is constantly exercised by the Commissioner of Internal

Revenue by transferring such officers from one distillery to another, and from one collection district to another.

The officers thus transferred or relieved from duty are not thereby removed from the public service. They still remain officers of the United States, subject to new assignments to duty by the Commissioner. The record shows that the defendants, Hoult, Sutton, Staubly, and Thayer, were all officers of the United States, duly appointed and commissioned by the Secretary of the Treasury, and themselves within the classified civil service long before the assignments complained of in these cases, having been reinstated to such positions by the Secretary of the Treasury after certification of their eligibility for such reinstatement by the Civil Service Commission.

The records also show that the defendants are capable and competent to perform the duties to which they were assigned; although it is insisted that that is not a question for the court to decide, but one which is executive and political in its character, and not subject to review by the court.

The affidavits filed show that the collector was a Republican; but they also show that the Hon. W. S. Forman, the Commissioner who made the assignments and revocations of assignments complained of, was a Democrat. The affidavits of the collector (see Ruckman record, 37) show that he made his recommendations to the Commissioner of Internal Revenue for the good of the service. The affidavits of G. W. Wilson (see Ruckman record, 38), Acting Commissioner of Internal Revenue, made in the absence of Commissioner Forman, show that neither said revocations nor assignments were

made for political reasons, or because of the political or religious opinions or affiliations of either the plaintiffs or defendants, but for other reasons involving the good of the service.

There seems to have been a disposition within the last half year to test the question of the right of the courts to intervene to prevent the removal of persons within the classified service. It is believed that all the courts applied to, except in the district of West Virginia, have decided that the appointment to and removal from public office under the Government of the United States is not a ministerial act, but an executive act, and as such not subject to regulation or control by the courts.

The case of *Morgan* v. *Nunn*, collector, etc., was decided by Judge Lurton, of the United States circuit court for the middle district of Tennessee, since the decisions in these cases. The plaintiff, William C. Morgan, was a general clerk in the office of defendant D. A. Nunn, collector of internal revenue for the fifth district of Tennessee. Plaintiff filed a bill alleging that defendant was seeking, in violation of the civil-service law, to remove plaintiff from his position as general clerk, and had recommended plaintiff for the place of storekeeper and gauger for no other reason than that plaintiff was a Democrat and defendant a Republican. Demurrer to the bill was sustained. In his opinion in this case, Lurton, Judge, after reciting paragraph 3, rule 2, of the civil-service rules, and the Executive order of July 27, 1897, says:

> That these authoritative orders of the Chief Executive have been or are about to be most flagrantly

violated by the defendant, who is a subordinate executive officer, car not be and has not been denied.

But the question contested is the power of a court of equity to prevent such violation by the writ of injunction. This authority is questioned upon two grounds:

First. It is said that the civil-service rules, so far as they deny the unrestrained power of removal, are not the law of the land, but are mere Executive orders, dependent for their force upon the vigilance and earnestness of the Chief Executive in compelling his appointees to obey and regard regulations voluntarily imposed by him as a voluntary regulation by the appointing power of its otherwise unrestrained power of removal. To this contention I am constrained to yield my assent. These rules regulating the power of removal were made by the President, and may be repealed, altered, or amended at his pleasure. Prior to November 2, 1896, no such restraints existed, and if after that date they came into force it was alone by virtue of an Executive order. Law is not thus enacted, altered, or amended. Law must be an expression of a rule of action by the legislative authority.

These civil-service rules, as far as they deal with the executive right of removal—a right which is but an incident of the power of appointment—are but expressions of the will of the President, and are regulations imposed by him upon his own actions or that of heads of departments appointed by him. He can enforce them by requiring obedience to them on penalty of removal. But they do not give to the employees within the classified civil service any such tenure of office as to confer upon them a property right in the office or place.

Second. Another and equally serious objection to the power of this court to grant relief is found in

the fact that a court of equity will not by injunction restrain an executive officer from making a wrongful removal of a subordinate appointee, nor restrain the appointee, nor restrain the appointment of another. This is a general limitation upon the power of courts of equity, regardless of whether the removal is from a Federal, State, or municipal office.

In support of these positions Judge Lurton cited the following cases:

Attorney General v. *Clarendon*, 17 Vesey, 491–498.
Tappon v. *Gray*, 9 Paige, 507–509, 513.
Hagner v. *Hayberger*, 7 Watts and Serg., 104.
Updegraph v. *Crans*, 47 Penn. State, 103.
Cochran v. *McCleary*, 22 Iowa, 75.
Delehanty v. *Colvin*, 78 Ill., 237.
Beebe v. *Robinson*, 52 Ala., 66.
Moulton v. *Reid*, 54 Ala., 320.
Muhler v. *Hedikin*, 119 Ind., 481.
People v. *Canal Board*, 55 N. Y., 393.

To the same effect is the decision rendered by Pardee, circuit judge, and Newman, district judge, for the northern district of Georgia, in the case of *James M. Couper* v. *W. H. Smyth, P. M.*

In this case it was said:

The United States circuit court, in equity, is without jurisdiction to restrain or control United States post-office officials in the removal of subordinate officials or employees.

The equitable jurisdiction of the circuit courts of the United States is not enlarged by the civil-service law of January, 1883, or by any of the rules and regulations of the Civil Service Commission thereunder.

Judge Kirkpatrick, of the United States circuit court for the district of New Jersey, in rendering the decision in the case of *Page and others* v. *Moffett, Collector of Internal Revenue of the First District of New Jersey,* has rendered a decision to the same effect. In this suit the bill alleges—

> That the complainants are officers of the United States, appointed by the collector for an undefined term of service; that the office is one within the classified service, and subject to the provisions of an act entitled "An act to regulate the civil service of the United States," approved January 16, 1883; and that under the rules and regulations promulgated by the President of the United States they can not be removed therefrom except for cause and upon written charges filed, of which they should have had full notice and an opportunity to make defense. They also, in their bill, allege that no cause for their removal has been assigned, nor has any notice thereof been given to them, nor any opportunity afforded them to make defense; and they charge that the removal is made solely for political reasons, contrary to the true intent and meaning of the civil-service act and the various rules and regulations promulgated by the President of the United States under the authority thereof and section 1753 of the Revised Statutes of the United States. The bill therefore prays for an injunction restraining the collector of internal revenue from removing the complainants from office, inasmuch as such action is contrary to law.

In the decision in this case the learned judge says:

> That the persons so appointed deputies are officers of the United States need not, for the purposes of this application, be denied, nor does it seem open to question that the power of their removal rests with

the appointing power, the collector, subject to such requirements as to notice as the Commissioner of Internal Revenue may prescribe. These rules of the Commissioner of Internal Revenue, if any there be, can not have the force and effect of law, nor would a failure to comply with them justify the interference of a court of equity. (*United States* v. *Eaton*, 144 U. S., 677.) The power of removal, which by the act vested in the appointing power, subject though it be to certain limitations, can not be reviewed by an appeal to the courts. The result would be a breaking down of all discipline in every administrative department of the Government.

But the complainants insist that the office of deputy collector of internal revenue is in the "classified service" and subject to the provisions of what is called the civil-service act, and the rules and regulations promulgated by the President of the United States in respect thereto, and particularly Rule II, as amended July 27, 1897. "In the exercise of power vested in him by section 1753 of the Revised Statutes of the United States and an act to regulate and improve the civil service of the United States, approved January 16, 1883," the President of the United States, under date of November 2, 1896, promulgated certain rules for the regulation of the civil service, none of which, however, prohibited removals from office except for political or religious opinions, and on July 29, 1897, by the same authority, Rule II, on which complainants rely, was amended so as to read as follows:

"No removal shall be made from any position subject to competitive examination except for just cause filed with the head of Department or other appointing officer, and of which the accused shall have full notice and an opportunity to make defense."

It will aid us in determining the force and effect to be given to these Presidential rules and regulations to look at the power which is vested in the President by the 1753d section of the Revised Statutes and the act of January 16, 1883, known as the civil-service act, under which they were professedly issued. The former authorizes "the President to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof." It nowhere makes mention of removal. The civil-service act merely provides the machinery for fair and suitable examinations by which there may be procured a list of persons properly qualified to perform the duties of the several offices of the Government, and from which those intrusted with the duty of appointment should make their selection. Its object was to make more efficient the public service by limiting the power of appointment to a class of qualified applicants; to take away the right or privilege of any one to nominate persons whose fitness was purely political; to provide for each vacant office in the public service as it occurred some person who had, in a competitive examination, shown himself best adapted to the discharge of its duties; that, having so obtained his office, this person was not to be obliged to contribute to any political fund or render any political service, nor to be subject to removal because he failed to do so, nor because he refused to make contributions of money or other valuable thing for any political purpose.

The act saves to persons honorably discharged from the military or naval service of the United States the preferences conferred upon them in former acts, and reserves to the President any authority not inconsistent with the act conferred in section 1753

of the Revised Statutes. Except as mentioned above, the act puts no restriction upon the power of removal; it leaves the appointing power as free as before its passage to make removals at will, save only for refusal to contribute to political funds or neglect to render political service.

In prescribing regulations to promote the efficiency of the public service the President may, no doubt, promulgate rules relating to the removal of persons in office which shall be observed by his subordinates, in order that there may be a harmony of action throughout the several departments of the Government of which he is the head, and he may in various ways compel obedience to these rules by his subordinates. He may make these rules accord with his own views of the proper administration of the law. He may modify or even revoke them to-day, and he may change them from time to time at his pleasure. They can not, therefore, be regarded as laws which can only be repealed by the joint action of the legislative and executive departments of the Government.

While these rules and regulations may have the force and effect of law upon subordinate administrative officers, they can not give to officeholders vested rights in their offices; nor can a court of equity regard them as conferring property rights which it is in their province to protect.

To the same effect is the decision of Judge Jenkins in *Carr* v. *Gordon* (82 Fed. Rep., 373), and the decision of Judge Baker, in the case of *Taylor* v. *Kercheval* (82 Fed. Rep., 497).

The decision of the court below in these cases places the "rights" of the inferior officers in the classified

service above the rights, the power, and the dignity in the service of the heads of departments. The removed inferior officer, who claims that his removal was a violation of the civil-service law and rules, has only to ask an injunction and he will be kept in office until the appointing power shall have instituted and prosecuted to completion some form of legal proceeding to try his "title" to the office. Surely this is absurd and subversive of all discipline. Even if the courts will take jurisdiction to control the matter of appointments and removals, the proper proceeding would be for the person regularly appointed to enter upon the discharge of the official duties of the position and then for the removed officer to institute the proceedings.

But in these cases it is left to the superior officer hereafter to take some steps at law if he would show that he has acted within his powers and has not violated his duty. The presumption that a public officer has done his duty is ignored if not reversed. It is to be noted that the decrees below have not proceeded on the ground that the plaintiffs intend to try these questions at law; but the decrees grant these plaintiff gaugers and storekeepers an injunction and leave the Secretary of the Treasury and the Commissioner of Internal Revenue to assert their own innocence, to say nothing of their authority, if they can do so and see fit to do so, by some future proceeding to be instituted by them.

Even in a case not involving appointments or removals nor any other political matter, but a question of property rights merely, it has been decided that where an execu-

tive officer is vested by law with the exercise of discretion and is not performing a merely ministerial act, the courts can not intervene to control the exercise of that discretion in the first instance, but that the executive officer must be permitted to exercise discretion untrammeled, and the result of the exercise of that discretion must be carried into effect, although that result, after it has become effective, may then become a proper subject of judicial cognizance. (*Walker* v. *Smith*, 62 U. S., 579.)

This was a case where the Commissioner of the land office was about to issue "certain scrip" to defendant Smith, to which complainant Walker claimed to be entitled as assignee of Smith, but the court refused an application for an injunction on the ground above stated.

Therefore, even if the right exists to entertain any proceeding at the suit of an officer removed from a position within the classified civil service, the orderly course would be for the new appointee to take the place, and for the legal proceeding to "try title" to be then instituted by the removed officer, not by the appointing power.

It is earnestly contended that the decision of the court below is in contravention of the Constitution of the United States, in that it seeks to give to mere rules and regulations the force and effect of law; and the more especially as it would make such rules and regulations effective to limit not only the executive power of appointment, but the executive power of removal. This can not be done by act of Congress, and certainly not by Executive orders.

CONCLUSION.

It is respectfully submitted that the honorable circuit court erred, for the reasons given and the authorities cited above, in entertaining jurisdiction of the bills in these suits and granting the injunctions; and that the injunctions should be dissolved and the bills dismissed.

JAMES E. BOYD,
Assistant Attorney-General.
JOSEPH H. GAINES,
United States Attorney for the District of West Virginia.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

A. B. WHITE, COLLECTOR OF INTERNAL revenue, et al., appellants, *v.* H. C. BERRY.	No. 539.
SAME *v.* WILLIAM BUTLER.	No. 540.
SAME *v.* J. G. RUCKMAN.	No. 541.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

SUPPLEMENTAL BRIEF OF APPELLANTS.

As counsel for the appellants, this supplemental brief, or brief in reply, is filed to call the attention of the court more particularly to the several statutes under which

storekeepers and gaugers in the Internal-Revenue Service are appointed, how they are compensated, and the authority vested in the Commissioner of Internal Revenue, as the head of the Internal-Revenue Bureau, to assign these officers to distilleries for duty, to transfer them from one place of duty to another, and to suspend or relieve them from duty, as his judgment and discretion may direct. These officers are appointed and commissioned by the Secretary of the Treasury, and his authority to appoint is derived from the following sections of the Revised Statutes of the United States and the other acts of Congress named:

APPOINTMENTS.

SEC. 3153. There shall be appointed by the Secretary of the Treasury such number of internal-revenue storekeepers as may be necessary, who shall each receive such compensation, not exceeding *four* dollars a day, to be paid monthly by the United States, as may be determined by the Commissioner of Internal Revenue. No storekeeper shall be engaged in any other business while in the service of the United States, without the written permission of the Commissioner of Internal Revenue. Every storekeeper shall take an oath faithfully to perform the duties of his office, and shall give a bond, to be approved by the Commissioner of Internal Revenue, for the faithful discharge of his duties, in such form and for such amount as the Commissioner may prescribe.

SEC. 3156. The Secretary of the Treasury shall appoint in every collection district, where they may be necessary, one or more internal-revenue gaugers,

who shall each take an oath faithfully to perform his duties, and shall give bond, with one or more sureties, satisfactory to the Commissioner of Internal Revenue, for the faithful discharge of the duties assigned to him by law or regulations; and the penal sum of said bond shall not be less than five thousand dollars, and said bond shall be renewed or strengthened as the Commissioner of Internal Revenue shall require. The duties of every such gauger shall be performed under the supervision and direction of the collector of the district to which he may be assigned, or of the collector in charge of exports at any port of entry to which he may be assigned.

THE TWO OFFICES MAY BE COMBINED.

SEC. 3153*a*. [Extract from legislative, executive, and judicial appropriation act, Aug. 15, 1876 (19 Stat., 152)]:

That the Secretary of the Treasury may, upon the recommendation of the Commissioner of Internal Revenue, impose the duties of storekeeper and gauger upon one officer, where the amount of spirits produced at the distillery to which such officer may be assigned, is not sufficient in the judgment of the Commissioner to warrant the employment of two officers to perform the separate duties of storekeeper and gauger. The Secretary of the Treasury may issue a commission to such officer as storekeeper and gauger, but the compensation for his services as storekeeper and gauger shall be that of storekeeper only. And the said officer shall, before entering upon the discharge of such duties, give a bond in the penal sum of not less than five thousand dollars for the faithful performance of the combined duties of storekeeper and gauger.

COMPENSATION.

3153*b*. [Extract from section 2 of the legislative, executive, and judicial appropriation act, approved June 21, 1879. (21 Stat., 23.)]

Hereafter storekeepers at distilleries that mash less than sixty bushels of grain per day shall be allowed not exceeding fifty dollars per month. But when one person acts as storekeeper and gauger, his salary shall not exceed four dollars per day for the time actually employed.

3153*c*. [Extract from legislative, executive, and judicial appropriation act for the fiscal year ending June 30, 1885, approved July 7, 1884. (23 Stat., 172.)]

* * * Hereafter storekeepers, or storekeepers and gaugers, who are assigned to distilleries whose registered capacity is twenty bushels or less, shall receive two dollars per day for their services.

SEC. 3157. Gaugers shall be entitled to receive such fees, to be determined by the quantity gauged, as may be prescribed by the Commissioner of Internal Revenue; and said fees, together with their actual and necessary traveling expenses, shall be verified by their oaths, and shall be paid by the United States monthly.

SEC. 3157*b*. [Extract from legislative, executive, and judicial appropriation act of August 15, 1876. (19 Stat., 143.)]

* * * gaugers * * * shall only receive compensation when rendering actual service.

ONLY TO RECEIVE COMPENSATION WHEN RENDERING ACTUAL SERVICE.

[Extract from legislative, executive, and judicial appropriation act approved August 15, 1876. (19 Stat., 152.)]

Hereafter no storekeeper shall receive a greater compensation than four dollars per day; and said gaugers and storekeepers respectively shall only receive compensation when rendering actual service.

MAY BE ASSIGNED, TRANSFERRED, AND SUSPENDED BY THE COMMISSIONER OF INTERNAL REVENUE.

SEC. 3153*d*. *Section 64, act August 28, 1894.* That the officer holding the combined office of storekeeper and gauger, under the provisions of the legislative, executive, and judicial appropriation act, approved August fifteenth, eighteen hundred and seventy-six (Nineteenth Statutes, page one hundred and fifty-two), may be assigned by the Commissioner of Internal Revenue to perform the separate duties of a storekeeper at any distillery, or at any general or special bonded warehouse, or to perform any of the duties of a gauger under the internal-revenue laws. And the said officer, before entering upon the discharge of such separate duties, shall give a bond to be approved by the Commissioner of Internal Revenue, for the faithful discharge of his duties, in such form and for such amount as the Commissioner may prescribe.

SEC. 3154. One or more storekeepers shall be assigned by the Commissioner of Internal Revenue to every bonded or distillery warehouse established by law; and any storekeeper may be transferred * * * by the Commissioner of Internal Revenue, from one warehouse to another.

SEC. 3156*a*. *Section 65, act Aug. 28, 1894.* That internal-revenue gaugers may be assigned to duty at distilleries, rectifying houses, or wherever gauging is required to be done, and transferred from one place of duty to another, by the Commissioner of

Internal Revenue, in like manner as storekeepers and storekeepers and gaugers are now assigned and transferred.

SEC. 3163, as amended by section 2, act of March 1, 1879. (20 Stat., 327).

* * * The Commissioner may also transfer any inspector, gauger, storekeeper, or storekeeper and gauger, from one distillery, or other place of duty, or from one collection district, to another.

THE POWERS OF TRANSFER AND SUSPENSION OF STOREKEEPERS AND GAUGERS FORMERLY CONFERRED UPON SUPERVISORS OF INTERNAL REVENUE, VESTED IN THE COMMISSIONER OF INTERNAL REVENUE.

SEC. 3163*a*. [Extract from legislative, executive, and judicial appropriation act, approved August 15, 1876. (19 Stat., 152.)]

* * * The powers of transfer, and of suspension, of officers conferred upon supervisors by section 3163 of the Revised Statutes, are hereby vested in the Commissioner of Internal Revenue; and all other powers conferred, and duties imposed, by said section upon supervisors, are hereby conferred and imposed upon collectors of internal revenue within their respective districts. In case of the supervision (suspension) of a collector, under the power hereby conferred, the Commissioner of Internal Revenue shall, as soon thereafter as practicable, report the case to the President through the Secretary of the Treasury for such action as he may deem proper.

Section 3163 *of the Revised Statutes:*

Every supervisor, under the direction of the Commissioner, shall see that all laws and regulations relating to the collection of internal taxes, are faithfully executed and complied with; and shall aid in

the prevention, detection, and punishment of any frauds in relation thereto, and examine into the efficiency and conduct of all officers of internal revenue; and for such purpose he shall have power to examine all persons, books, papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel a compliance with such summons in the same manner as collectors may do. He shall report in writing to the Commissioner of Internal Revenue any neglect of duty, incompetency, delinquency, or malfeasance in office of any internal revenue officer of which he may obtain knowledge, with a statement of all the facts in each case, and any evidence sustaining the same.

He may, by notice in writing, suspend from duty any inspector, gauger, or storekeeper, and he may suspend any collector for fraud, or gross neglect of duty, or abuse of power. In case of the suspension of any inspector, gauger, or storekeeper, he shall immediately notify the collector of the proper district and the Commissioner of Internal Revenue, and within three days thereafter report his action and his reasons therefor, in writing, to the Commissioner. In case of the suspension of any collector, he shall immediately report his action to the Commissioner, with his reasons therefor, in writing, and the Commissioner, in all cases of suspension, shall thereupon take such action as he may deem proper. Every supervisor may also transfer any inspector, gauger, or storekeeper from one distillery, or other place of duty, or from one collection district, to another.

By c. 287 of the statutes of 1876, v. 19, p. 152, the powers of transfer and suspension conferred upon supervisors by this section were vested in the

> Commissioner of Internal Revenue, and all other powers conferred and duties imposed upon supervisors by this section were, by the statute of 1876, conferred and imposed upon collectors of internal revenue within their respective districts.

(The sections above noted by the letters *a*, *b*, *c*, and *d* are designated in this way by "Internal-Revenue Laws, 1894," compiled under direction of the Commissioner of Internal Revenue.)

By virtue of the provisions of these several statutes the court will see that, while the appointment of storekeepers and gaugers is vested by law in the Secretary of the Treasury, their assignment to duty, transfer, suspension, and relief from duty is conferred upon the Commissioner of Internal Revenue and rests in his discretion and judgment. And the contention of appellants is that such assignments, transfers, suspensions, and relief from duty being matters within the discretion and judgment of an executive officer of the Government, the courts will not interfere by injunction or otherwise with the exercise of this judgment and discretion. This principle we understand to be decided in *Gaines* v. *Thompson*, 7 Wall., 347, and reaffirmed in *Litchfield* v. *Register and Receiver*, 9 Wall., 575; *U. S.* v. *Seaman*, 58 U. S. (17 How.), 470 (cited in general brief); opinion Solicitor of the Treasury in case Sidenburg & Co., 27 Int. Revenue Record, 47.

Congress, in conferring the powers contained in the foregoing statutes upon the Commissioner of Internal Revenue, undoubtedly had in mind the interests of the

United States in securing the operation of distilleries where spirituous liquors are produced strictly in accordance with the requirements of law, in order that the product of such distilleries would be faithfully accounted for, and the taxes collected as provided by law. The distiller carries on his business under the supervision of the storekeeper, and the product of the distillery is gauged and reported by the guager, so that when stamps are required to denote the payment of internal-revenue taxes upon the product of the distillery the collector can issue according to such reports. The court will see from this relation of these officers to the distiller how important it is for the Commissioner of Internal Revenue to have entire control of the assignment, transfer, and suspension of these officers.

A storekeeper can at any time, by collusion with a distiller or by negligence in the performance of his duties, open the way for fraud upon the Government in the collection of its revenues; and the gauger can also, if he is of a mind to, make opportunity to defeat the collection of internal-revenue taxes justly due the Government. From this the court will readily observe how important it is that the Commissioner of Internal Revenue have the power to control these officers, to assign them to duty at such distilleries as he may see proper, to transfer from one place of duty to another, and to suspend or relieve from duty, if in his opinion the due administration of the law requires it. If the courts have the right to interfere in one instance with the exercise of this judgment and discretion on the part of the commissioner, they would have the right in every instance.

If the Commissioner should conclude, from evidences which are brought to him, that a storekeeper or gauger is corrupt or is negligent and that the interests of the Government are being jeopardized, and orders his suspension, would anyone contend that the court would have the right to interfere and restrain the Commissioner from making such suspension and continue the storekeeper or gauger under the assignment? Such action on the part of the courts would not only tend to demoralize and destroy the efficiency of this service, but would at once supplant the authority which is vested in an executive officer of the Government and place in its stead the right of the judiciary to control the action of the executive department.

Take, for instance, the case of a storekeeper under assignment, who becomes, from illness or otherwise (without his fault), temporarily disabled to perform his duties. Certainly the Commissioner would have the right to assign another in his stead. In order to do this, the Commissioner would have to revoke the existing assignment. This action would leave him still in office, ready for another assignment when the disability is removed.

The Commissioner, having the power of assignment of storekeepers and gaugers to duty, must necessarily have also the power to revoke assignments. Otherwise, when a distillery ceases to operate, the storekeeper and gauger assigned would continue on duty and to draw pay, notwithstanding such cessation. The power of the Commissioner is complete in another view, and that is, the authority which is vested in him to suspend a storekeeper or gauger. The Commissioner does not have to

give notice to a storekeeper on duty that he is going to suspend him. By the statute before cited the powers of transfer and of suspension of officers, conferred upon supervisors by section 3163 of the Revised Statutes, are vested in the Commissioner of Internal Revenue.

By reading section 3163 it will be observed that the supervisor of internal revenue did not have to give the suspended officer any previous notice. The suspension was by notice to him in writing, that is, he had to be notified in writing, not that he was going to be suspended, but that he was actually suspended. Now, this power, by the provision of the executive, legislative, and judicial appropriation act of August 15, 1876 (19 Stat., 152), is conferred upon the Commissioner of Internal Revenue. The notice which the supervisor was required to give by section 3163 was notice to the collector of the district and to the Commissioner of Internal Revenue that he had suspended a storekeeper or gauger, and give his reasons therefor. No such report is necessary when the suspension is by the Commissioner himself. The assignment of another storekeeper or gauger to a distillery to take the place of such officer then under assignment at the distillery does not, as is contended by counsel for complainants in these cases, remove the latter from office nor put him out of commission. Such action on the part of the Commissioner simply amounts to a suspension of the officer under assignment from actual duty and leaves him still a commissioned officer of the United States to be assigned to duty at another place whenever the Commissioner of Internal Revenue sees proper. The position of counsel for complainants in these cases is that, if the Com-

missioner of Internal Revenue has the power to revoke an assignment, it puts out of the service the storekeeper or gauger whose assignment is revoked. This is not the law, because storekeepers and gaugers are appointed and commissioned by the Secretary of the Treasury, and he alone can revoke their commissions or remove them from office. The authority of the Commissioner of Internal Revenue is simply to make or revoke assignments, and to place on duty or off duty, and not to affect the appointment or commission of the officer.

It was insisted by the counsel for the complainants in his argument that no authority of an executive officer was affected by the injunction in this case, and, as we understood it, he admitted the authority of the Commissioner of Internal Revenue, as an executive officer under the law, to make assignments of storekeepers and gaugers, to transfer them from one place of duty to another, or to suspend them from duty altogether. If this position be true, then it is as much an interference with the power of the Commissioner to enjoin the officer whom he has assigned to duty, and prevent him from taking charge of the distillery to which he is assigned, as it would be to enjoin the Commissioner himself from making the assignment. This is doing indirectly that which it is admitted could not be done directly.

The Congress evidently had in mind the fact that there would be frequent changes in the assignment, transfer, and suspension from duty of this class of officers, because it is provided in the legislative, executive, and judicial appropriation act for 1885, approved July 7, 1884 (23 Stat., 172), that the number of such officers in

commission may be as many as 15 per cent in addition to those indispensably necessary to the performance of duty. Then, the number of distilleries in operation in a district is continually changing; new ones are established, others go out of business, frequently those in operation suspend temporarily, and often seizures of distilleries are made by the Government for violations of the laws, all these things make the exact number in operation a matter of uncertainty and consequently the assignment and opportunity for assignment of storekeepers and gaugers are more or less affected. The result is that there is always a number of these officers in a district holding commissions, qualified to perform duty, who are idle, not being under assignment and, consequently, not receiving pay. These constitute a contingent which the Commissioner of Internal Revenue can draw upon any time he sees proper, in the exercise of the power which we insist is vested in him to revoke existing assignments and assign other officers in their stead. They are commissioned officers awaiting orders.

The attention of the court is also called, in considering the power of the Commissioner of Internal Revenue not only to make assignments of storekeepers and gaugers to distillery warehouses, but to revoke or change such assignments whenever he sees proper, to regulations which have been established and promulgated by the Commissioner of Internal Revenue under the authority of the internal-revenue laws. These regulations are known as series 7, No. 7, revised February 19, 1895, and are entitled, "Regulations and instructions concerning the tax on distilled spirits under the Revised Statutes

of the United States and subsequent acts." On page 35 of this series, under the head of "Assignment of storekeepers," the power and duty of the Commissioner of Internal Revenue are defined, and, among other powers set forth, is the following:

> The Commissioner of Internal Revenue is alone authorized by law to assign storekeepers to duty, revoke their assignments, and fix the rate of their compensation while on duty.

It may be of interest to the court in this connection to call attention to the several forms which have been prescribed and are in use by the Commissioner of Internal Revenue for the assignment of storekeepers, for the revocation of assignments, and for transfer from one place of duty to another. The forms are separate and are numbered, respectively, 24, 25, and 139.

Office Form No. 24.
Ed. 7 3 97 1,000.

Assignment of U. S. Storekeeper.

——. TREASURY DEPARTMENT,
OFFICE OF THE COMMMISSIONER OF
INTERNAL REVENUE,
Washington, D. C., ———, *189* .

——— ———, Esq.,
U. S. Storekeeper,
——— ———.

SIR: Having been duly appointed and qualified as internal-revenue storekeeper, you are hereby assigned for ——— service to the distillery warehouse

of ———, in the ——— district of ———, under the direction of the collector, to take effect ———.

Your compensation will be ——— dollars per day for such time as you shall be actually employed.

The statute prohibits your being engaged in any other business while in the service of the United States, without a written permission from this office.

——— ———.

Respectfully yours,

——— ———,
Commissioner.

Office Form No. 25.
Ed. 4 24 96 1,500.

Revocation of assignment of U. S. storekeeper.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
Washington, D. C., ———, *189—*.

——— ———, esq.,
U. S. Storekeeper,
——— ———.

SIR: Your assignment to duty for ——— service at the distillery warehouse of ———, in the ——— district of ———, is hereby revoked, to take effect ———.

You will turn over all keys, books, and papers in your possession to your successor, or to the collector, as the case may be.

Respectfully, yours,

——— ———,
Commissioner.

Office Form No. 139.
Ed. 4 24 96 2,000.

Transfer of U. S. storekeeper.

TREASURY DEPARTMENT,
OFFICE OF THE COMMISSIONER OF
INTERNAL REVENUE,
Washington, D. C., ———, *189—.*

———, Esq.,
U. S. Storekeeper,
———.

SIR: You are hereby transferred from ——— service at the distillery warehouse of ——— in the ——— district of ——— and assigned for ——— service to the distillery warehouse of ——— in the same district, under direction of the collector, to take effect ———.

Your compensation will be ——— dollars per day for such time as you shall be actually employed.

You will turn over all keys, books, and papers in your possession to your successor, or to the collector, as the case may be.

Respectfully, yours,

———,
Commissioner.

The forms prescribed and used for the assignment, revocation of assignment, and transfer of gaugers and of persons holding jointly the office of storekeeper and gauger are of the same character.

JAS. E. BOYD,
Assistant Attorney-General.
JOS. H. GAINES,
United States Attorney for the District of West Virginia.

Supreme Court of the United States.

NOS. 539, 540 AND 541.

A. B. WHITE, COLLECTOR, &c., *et al*,
vs.
H. C. BERRY,
} *In Equity.*

A. B. WHITE, COLLECTOR, &c., *et al*,
vs.
WILLIAM BUTLER,
} *In Equity.*

A. B. WHITE, COLLECTOR, &c., *et al*,
vs.
J. G. RUCKMAN,
} *In Equity.*

The above entitled three causes were, by stipulation of counsel, heard together upon the bills, demurrers, answers and affidavits, filed in the causes, and a final decree entered in each of the cases on the 8th day of November, 1897, perpetuating the temporary injunction and restraining A. B. White, Collector, &c., and the other defendants, from in anywise interfering with the plaintiffs in the possession of their offices, and in the discharge of their duties at the Hannisville Distillery, until they, or either of them should be removed by proper proceedings under the Civil Service Law and the Rules and Regulations made in pursuance thereof, or by judicial proceedings at law.

From this decree the defendants have appealed to this Court,

assigning thirteen grounds of error in the proceedings below. The three causes involve the same questions of law and rest upon about the same facts, and can, therefore, be considered together.

BRIEF STATEMENT OF FACTS.

On the dates of filing said bills, J. G. Ruckman and William Butler were holding the positions of storekeeper, and H. C. Berry was holding the position of gauger, at the Hannis Distillery, in the city of Martinsburg, West Virginia, under appointments made by the Secretary of the Treasury, in 1893. They allege in their bills that the defendant White, as Collector, had declared his purpose to have them removed from their offices by recommending the appointment of the other defendants named in said bills, for appointment by the Secretary of the Treasury, and the assignment of said defendants to the positions which they held; that the sole ground for the removal of said complainants was because of their political affiliations; that the sole ground for the appointment and assignment of the defendants to said offices was because of their political affiliations; that complainants had been honest, faithful and competent in the discharge of the duties of their respective positions; that they were protected from arbitrary removal for political reasons by what was known as the Civil Service Act, passed on January 16, 1883, and the Rules and Regulations promulgated in pursuance of said act and the act of March 3, 1871; that there were no vacancies that could be filled by the defendants in the offices of storekeepers or gaugers in the District of West Virginia, as there were at that time borne upon the rolls the names of appointees exceeding fifteen per cent of the number of storekeepers and gaugers actually engaged in performing duty at the time and indispensably necessary for the performance of said duty; that they were officers of the government duly assigned to their respective duties by proper and legal authority, and then in active discharge of the duties of said offices, and prayed that the Collector be enjoined from "recommending, assigning and appointing any persons to the same positions and from proceeding in the attempt to make such removals, and in any manner interfering with the plaintiffs" and further praying that the other defendants named be restrained from qualifying as storekeepers and gaugers, or from performing or discharging any

of the duties incident to the offices held by said complainants; concluding with a prayer for general relief.

To the bills of the complainants, the defendants entered a demurrer specifically setting forth fourteen grounds of demurrer in which the complainants joined. They also filed an answer, accompanied by exhibits, to which the complainants filed a general replication, and upon the issue thus joined the respective parties filed numerous affidavits, which are part of the records.

By stipulation of counsel, the Court heard the three causes upon the record as it appears before this Court, overruling the demurrer, and finding as to the facts in issue in favor of the complainants; continuing and perpetuating the injunction as prayed for in the bill.

The defendants in answer to the complainants' bills have filed a demurrer and in it they have assigned fourteen grounds why the bills should be dismissed. (Record, p 25.) After a careful examination of the causes of demurrer, I think I may confidently say that they may be embraced under three propositions, and this would apply, as well, to the assignment of error. (Record p 56.)

> *First:* That the assignment to duty or revocation of assignment, is not protected by the Civil Service Law.
>
> *Second:* That the provisions of the law, known as the Civil Service Law, are unconstitutional.
>
> *Third:* That a court of equity has no jurisdiction to interfere by its preventative remedy of injunction to grant the relief prayed for in said bills.

That the Court may be possessed of the statutes relied upon by the complainants, and the reason for their enactment, we will refer briefly to the history of the causes which led to their adoption, as well as to the provisions of the statutes we rely upon.

During thirty years of our constitutional history we had no laws fixing the tenure of office of public officials. I may confidently assert that up to 1820, by general acquiescense, the tenure of office in the federal government was only limited by merit and good behavior. It was during this period of our history that Mr. Madison made the famous remark "that the wanton removal

of a meritorious officer was an impeachable offense." Soon after that the Congress prescribed the four year limit of tenure to one or two classes of federal officials, which policy has been gradually extended until it now governs a large number of government officials. The result of the renewal of these commissions gradually brought the whole public service in the appointment of officers and employees, under what might be described in parliamentary language, the patronage of party, so that at each revolution of public sentiment the successful party claimed the right to bestow the offices of the government upon those who affiliated with them. The evils which followed from this system were soon recognized by the statesmen of the country, and the voice of warning, which was first heard in the '30's, has continued to the present time. Jefferson, in speaking of the four year tenure of office, said it "saps the constitution and salutary functions of the President, and introduces a principal of intrigue and corruption which will soon leaven the mass, not only of Senators, but of citizens." Webster was equally emphatic when he declared "I am for staying the further contagion of this plague. Men in office have begun to think themselves mere agents and servants of the appointing power." Clay, and other leaders of public thought, tried to arouse public sentiment, that they might be justified to some extent at least, in suppressing the evil, but the first act passed by Congress to control in any way the appointment of officers by the merit system, was adopted on the 3rd of March, 1853. It is found in the Revised Statutes of the United States, Sections 163 and 164.

> "Sec. 163. The clerks in the departments shall be arranged in four classes, distinguished as the first, second, third, and fourth classes.
>
> "Sec. 164. No clerk shall be appointed in any Department in either of the four classes above designated, until he has been examined and found qualified by a board of three examiners, to consist of the chief of the Bureau or office into which such clerk is to be appointed and two other clerks to be selected by the head of the Department."

These provisions were temporarily enforced, but during and after the war, became entirely obsolete. No further steps were taken until, through the urgent appeals of President Grant, on March 3, 1871, Congress passed what is now known as Section 1753 of the Revised Statutes of the United States, imposing upon the President the duty of prescribing regulations for the admission of persons into the Civil Service, and for the conduct of persons who may receive appointments.

> "Sec. 1753. The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointment in the civil service."

As no machinery was provided by this section, its provisions were practically ignored, although the powers conferred upon the President were of the broadest character. Constant suggestions by the Presidents as to the necessity for improving the public service at last aroused a strong public sentiment in the country, and we find that all of the political parties holding conventions in 1872, and up to 1883, endorsed and approved a reform of the civil service based upon merit and efficiency. This sentiment was so decided that on the 16th day of January, 1883, Congress passed an act "to regulate and improve the Civil Service of the United States," which created a commission "to aid the President, as he may request, in preparing suitable rules for carrying the act into effect," and further provided that "when said rules shall have been promulgated, it shall be the duty of all the officers of the United States in the departments, and those to which any such rules may relate, to aid, in all proper ways, in carrying said rules, and any modification thereof, into effect."

Congress in the passage of this act, did not, as in the act of 1871, simply declare a general policy, and in broad language authorize the promulgation of rules and regulations to govern the appointment and conduct of federal officers, but it proceeded in the second section of said act to specifically declare its purpose and intention as to "eight fundamental provisions" which it deemed essential in effectuating its purpose. The Congress was careful that in the construction of this act, the specification of these "eight fundamental provisions" should not be construed as limiting the powers conferred in the first clause of the section hereinbefore mentioned; for in the second clause, which embraced the "eight fundamental provisions," the Congress used this language "and, *among other things*, said rules shall provide and declare, as near as the condition of good administration will warrant, as follows:"

For the purpose of this argument it is not necessary to refer the Court to the 1st, 2nd, 3rd, 4th, 7th, or 8th "fundamental provisions" of the rules, but we believe that the 5th and 6th, bear upon the questions involved in these causes, and sustain fully the rules and regulations promulgated in obedience to the policy therein declared. We submit that these two clauses found in the act itself, and to carry out which, the President, through the aid of the commission appointed, should promulgate such rules and regulations as would give full force and effect to the policy, declared that the question of "contribution to any political fund," the rendering of "political services," the "authority and influence" of any official in the public service, should not be used to "coerce the political action of any person," prohibits as it says in the fifth clause, "removal or prejudice" because of political activity or because of political affiliation. It declares:

> *Fifth*, That no person in the public service is for that reason under any obligation to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.
>
> *Sixth*, That no person in said service has any right to use his official authority or influence to coerce the political action of any person or body.

The above provisions in the light of the reason and purpose which influenced Congress in the passage of this law, taken in connection with the provisions contained in the tenth, eleventh, thirteenth and fourteenth sections of the act, must convince the judicial mind that as to appointments, the conduct of appointee whilst in office, and the right of removal could only be controlled for causes other than *political.*

This view is fully sustained by the commission appointed under its provisions, and the Presidents who have promulgated the rules and regulations by virtue of its authority. The correctness of this suggestion will be seen by examining the rules and regulations which refer to the issues before the Court. Clause three of rule second provides:

> 3. No person in the executive civil service shall dismiss, or cause to be dismissed, or make any attempt to procure the dismissal of, or in any manner change the official rank or compensation of any other person therein because of his political or religious opinions or affiliations.

Clause six of rule second provides:

> 6. In making removals or reductions, or in imposing punishment, for delinquency or misconduct, penalties like in character shall be imposed for like offences, and action thereupon shall be taken irrespective of the political or religious opinions or affiliations of the offenders.

and these rules and regulations were rendered more effective by the rule promulgated by President McKinley, on July 27, 1897, amendatory to the Civil Service rule 2, which provides as follows:

> "No removal shall be made from any position subject to competitive examination except for just cause, and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have full notice and an opportunity to make defence."

The Court being now in possession of the laws enacted by Congress, and the rules and regulations issued under authority of the provisions of said act by the Executive, which the complainants claim protects them against the unauthorized acts of their superior officers, I shall proceed to discuss the three propositions, which we believe includes all the assignments of error, as well as the causes of demurrer, suggested by the appellants.

I.

That the assignment to duty or the revocation of assignment, is not protected by the Civil Service Law.

With the view of properly presenting this question to the Court, I shall proceed to show by the statutes the manner in which these officers are appointed; the duty of the Secretary of the Treasury; the power conferred by law upon the Commissioner of Internal Revenue; and the authority for their removal.

Section 3153 of the Revised Statutes provides for the appointment of storekeepers and gaugers by the Secretary of the Treasury; their compensation, oath of office, and execution of bond. Under authority of the Legislative, Judicial and Executive Appropriation Act of 1885, 23rd Statutes-at-Large, 172, the law recognizes the right of the Collector of the district to recommend for appointment both storekeepers and gaugers, and limits the number that can be appointed, as follows:

> "And no Collector in any district shall recommend, nor shall there be appointed nor commissioned, more deputy-collectors, storekeepers, storekeepers and gaugers, gaugers, inspectors, or other officers, or allowed to remain in commission more of any of said officers, at any one time, than fifteen per cent in excess of the number engaged in performing duty at the time, and indespensably necessary for the performance of said duty."

The appointment of storekeepers is provided for in the following section:

> "There shall be appointed by the Secretary of

the Treasury such number of internal revenue storekeepers as may be necessary, who shall receive such compensation, not exceeding four dollars a day, to be paid monthly, by the United States, as may be determined by the Commissioner of Internal Revenue. No storekeeper shall be engaged in any other business while in the service of the United States, without the written permission of the Commissioner of Internal Revenue. Every storekeeper shall take an oath faithfully to perform the duties of his office, and shall give a bond, to be approved by the Commissioner of Internal Revenue, for the faithful discharge of his duties, in such form and for such amount as the Commissioner may prescribe."

Section 3156 provides for the appointment, oath and bond of gaugers:

"Sec. 3156. The Secretary of the Treasury shall appoint in every collection district where they may be necessary, one or more internal revenue gaugers, who shall each take an oath faithfully to perform his duties, and shall give bond, with one or more sureties, satisfactory to the Commissioner of Internal Revenue, for the faithful discharge of the duties assigned to him by law or regulations; and the penal sum of said bond shall not be less than five thousand dollars, and said bond shall be renewed or strengthened as the Commissioner of Internal Revenue may require. The duties of every such gauger shall be performed under the supervision and direction of the collector of the district to which he may be assigned, or of the collector in charge of exports at any port of entry to which he may be assigned."

And the compensation of gaugers is provided for in section 3157:

"Sec. 3157. Gaugers shall be entitled to receive

> such fees, to be determined by the quantity gauged, as may be prescribed by the Commissioner of Internal Revenue; and said fees, together with their actual and necessary traveling expenses, shall be verified by their oaths, and shall be paid by the United States monthly."

And the compensation of both is further limited by the provisions found in the Legislative, Executive and Judicial Appropriation Act approved Aug. 15, 1876.

> "Hereafter no storekeeper shall receive a greater compensation than four dollars per day; and said gaugers and storekeepers respectively shall only receive compensation when rendering actual service."

The power to assign to duty a storekeeper, when once appointed, is conferred by law upon the Commissioner of Internal Revenue. (Sec. 3154., Int. Rev. Laws.)

> "One or more storekeepers shall be assigned by the Commissioner of Internal Revenue to every bonded or distillery warehouse established by law; and any storekeeper may be transferred * * * by the Commissioner of Internal Revenue, from one warehouse to another,"

but under the provisions of Section 3163, the Commissioner of Internal Revenue is given authority to transfer these officers. It provides:

> "The Commissioner may also transfer any inspector, gauger, storekeeper, or storekeeper and gauger, from one distillery, or other place of duty, or from one collection district, to another,"

and this authority is further conferred by section 3163–B:

> "Sec. 3163*b*. *Sec. 63, act of August 28, 1894.* That storekeepers, and storekeepers and gaugers,

when transferred from one distillery to another, either in the same district or in different districts, shall receive conpensation not exceeding four dollars per day during the time necessarily occupied in traveling from one distillery to the other, together with actual and necessary traveling expenses."

These are all of the Internal Revenue provisions bearing upon the question of assignment or transfer of storekeepers and gaugers. The Court will observe that the power of appointment of these officers is conferred on the Secretary of the Treasury. The complainants have not questioned the authority of the Commissioner of Internal Revenue to assign them to duty at any distillery within the district, or to transfer them from duty in one district to duty in another district. The contention of the complainant Ruckman is that he was about to be removed from the position of head, or day, storekeeper, who has charge of the books at the distillery, responsible for the keys of the different buildings upon the grounds, and is, in fact, a supervisor over what is known as additional storekeepers; that this reduction in rank was because of his political sentiments; that he was to be reduced in rank and deprived of the dignity of his position, if not removed entirely from office, and he relied upon clauses three and six of rule second of the Civil Service Regulations to resist the attempt of the Commissioner of Internal Revenue to change his official rank. I refer to said rules printed on page 7.

The contention of storekeeper Butler and gauger Berry is that there rests no power in the Commissioner of Internal Revenue to revoke an assignment to duty under the provisions of the Internal Revenue Law, they contending that the revocation of assignment is, in fact, a removal; that it deprives them of the honor, dignity and emoluments of the offices and that no such authority has been conferred upon the Commissioner by law. It is admitted further, in the record, that the Commissioner exercised the power of revoking the assignment to duty of both storekeeper Butler and gauger Berry. The authorities lay down the well established proposition that even without an affirmative act revoking the powers and removing the officer, which was done in this case, that the appointment of a successor is *ipso facto* a

removal. (Throop Public Officers, Sec. 350.) This is, of course, to be understood where the office is held during the pleasure of the appointing power, and if the Secretary of the Treasury, who alone under the law had the power of removal, had appointed the successors to the complainants, and they were not protected by the Civil Service Law, and the rules and regulations made in pursuance thereof, it would necessarily have been a removal. The law confers, however, upon the Commissioner only the power to *transfer* or *assign to duty*, and his act revoking the assignment absolutely must be held null and void as without authority of law.

It is therefore not necessary at this point to discuss whether the office was held at the pleasure of the appointing power or not, as the revocation of assignment or the removal from office was not attempted to be made by the Secretary of the Treasury, but attempted by the Commissioner of Internal Revenue.

II.

That the provisions of the laws, known as the Civil Service Law, are unconstitutional.

It is neither the province of the Court or of counsel to consider whether Congress in the exercise of its granted powers, has acted wisely or unwisely in the passage of the laws to improve the Civil Service of the government. The sole question is whether they have exceeded their constitutional powers. That the federal government is a government of delegated powers only and that the authority of Congress to pass a given act, must be found in the authority conferred in the instrument itself, will not, of course, be questioned. Chief Justice Marshal in McCulloch *vs.* Maryland, 4 Wheaton, 423, says:

> "But where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This Court disclaims all pretensions to such a power."

and

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."

By Article 2, Section 2, of the Constitution, it is provided :

> "But the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

and in the 1st Article, 8th Section and 18th Clause, it is provided that Congress may

> "Make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

By the law which we have referred to, both storekeepers and gaugers are, under its provisions, appointed by a Head of Department, the Secretary of the Treasury, their duties, oath of office and bond constitutes them inferior officers within the meaning of the Constitution, and the question presented to the Court is, whether the Congress, having created these offices, under authority conferred upon it by the Constitution, can impose any restrictions or limitations upon their appointment, conduct or tenure. At common law it was almost universally held that a person, once vested with the title to an office, and having entered upon the discharge of its duties, could only be removed for cause.

(Baggs case, 11 Coke, Vol. 6, 98b.)

The common law is not, however, a part of the jurisprudence of the federal government, except so far as made so by statute,

and the doctrine laid down in the case of Ex Parte Duncan N. Henning, 13 Peters, 259, is the rule which has been almost universely acquiesced in in this country. That

> "All offices, the tenure of which is not fixed by the constitution or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law) during the life of the incumbent; or must be held at the will and discretion of some department of the government, and subject to removal at pleasure."

The learned judge further says on the same page:

> "In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment."

(Waites Action and Defenses, Sec. 14, authorities referred to.)

> "The right of the legislature to prescribe the conditions or the specific causes for a removal of an officer, has been recognized in many of the states and limits the power of removal to the conditions and causes so specified."

People *vs.* Higgins, 15 Ill., 110.
Mayor, *et al*, *vs.* Shaw, 16 Ga., 172.
Clark *vs.* People, 15 Ill., 213.
Lowe *vs.* Comm., 3 Met., (Ky.), 237.
Dubuc *vs.* Voss, 19 La., An., 210.
Meade *vs.* Treasurer, 36 Mich., 416.
State *vs.* Jersey City, 25 N. J. L., 536.
Gardner *vs.* People, 62 N. Y., 299.
Comm. *vs.* Shaun, 3 W. & S. (P.), 338.

The reverse of this doctrine must be equally true, and be sustained upon the same ground, that where the legislature prohibits the removal for political reasons, it is within the legislative dis-

cretion to do so. It is claimed, however, that this is an executive act and it is therefore not subject to a review by the judicial department of the government. The act of a subordinate executive officer, involving no judgment or discretion and done without authority of law, has been frequently the subject of review by the judicial department.

Kendall *vs.* United States, 12 Peters, 524.
United States *vs.* Schurz, 102 U. S., 378.
Butterworth *vs.* United States, 112 U. S., 50.

The Court has followed the declaration of Marshall in Marbury *vs.* Madison, 1 Cranch 137, in which he declares the exception. Speaking of the power of the Court to review an executive act, he says :

> "This power in the Courts is the difference between a government by law and a government by men."

The question as to the power of Congress to further provide conditions and limitations upon the conduct of public officials, and as to their removal, has been fully passed upon in the case of Ex parte Curtis, 106 U. S., 371, and in the case of the United States *vs.* Perkins, 116 U. S., 483 ; that the question is no longer open for discussion. The Court held in that case that

> "We have no doubt that when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed."

III.

That a Court of Equity has no jurisdiction to interfere by its preventative remedy of injunction to grant relief prayed for in said bills.

The complainants aver that they were in possession of the offices of storekeeper and gauger, and at the date of filing of said bills, were in the full and uninterrupted discharge of the duties of said offices; that they held the title, and claimed the emoluments and honors of said offices until removed in accordance with law; that certain parties whom they made defendants to said bills are, without authority of law, seeking to oust them from that possession; that they asked the intervention of a court of equity to prevent their forcible dispossession, averring that if once ousted they would not have a plain, adequate and complete remedy at law for the injury done them; that they would be in possession of a right without a remedy that would reach the "whole mischief and secure the whole right in a perfect manner, at the *present* and in the *future*."

The claim of appellants that equity can only interfere in a case of property rights does not weaken the position of the complainants. As stated by Judge Cooley, "The incumbent has a property right in it," referring to the offices. (Throop Public Officers, Section 23.)

When the jurisdiction of a court of equity is questioned we must refer to the fundamental principles on which its jurisdiction rests, to ascertain the extent and limitation of its powers. With this view, I refer the Court to 1st Story's Equity Jurisprudence, Secs. 26, 27, 30 and 32. I shall only quote in this brief, however, what Judge Story regards as the most complete and perfect definition that has yet been given of the extent of the jurisdiction of a court of equity.

> "It has a jurisdiction in cases of right, recognized and protected by the municipal jurisprudence, where a plain, adequate and complete remedy cannot be had in the Courts of Common Law. The remedy must be plain, for if it be doubtful and obscure at law, equity will assert jurisdiction; it must be adequate, for, if at law it falls short of what the party is entitled to, that founds a jurisdiction in equity; and it must be complete; that is, it must attain the full end and justice of the case. It must reach the whole mischief and secure the whole right to the

party in a perfect manner, at the present and in the future; otherwise equity will interfere and give such relief and aid as the exigency of the particular case may require. The jurisdiction of a court of equity is, therefore, sometime concurrent with the jurisdiction of a court of law; it is sometimes exclusive of it; and it is sometimes auxiliary to it."

We submit to the Court upon principle, that had the complainants yielded possession of the offices held by them at the date of the issuing of injunction there could have been no plain, adequate or complete remedy, which under the view of Mr. Story would have reached the whole mischief and secure the whole right in a perfect manner, *"at the present time and in the future."* Under any proceedings known to the Courts of Common Law, the emoluments of the offices would have been lost to the complainants, for in the Legislative, Executive and Judicial Appropriation Act of Aug. 15, 1876, (19 Stat. 152) it is provided that said "gaugers and storekeepers shall only receive compensation when rendering actual service."

A writ of *quo warranto* would have been doubtful, not a plain remedy, as courts have refused to grant relief applied for by former occupants of office, on the ground that his dismissal from office had been illegal, where it was satisfied that if he should be reinstated, he might be legally dismissed.

Ex parte Richards, 3 L. R. Q. B., div. 368; 47 L. R. Q. B., 498.
State *vs.* Tudor, 5 Day (Conn.) 329.
State *vs.* Porter, 58 Iowa, 19.
State *vs.* Jacobs, 17 Ohio, 143.
Attorney General *vs.* Megin, 63 N. H., 378.

Mandamus would not lie as it is a writ that does not properly try the question of title.

Throop Public Officers, Secs. 787, 789, 790.
Parks *vs.* Boston, 8 Pick. (Mass.) 218.

Certiorari will be refused when the proceedings are of a ministerial character.

People *vs.* Walter, 68 N. Y., 403.

It will not lie to review proceedings of inferior tribunals, boards, officers, etc. :

State vs. Bassett, 33 N. J. L., 26.
State *vs.* Trinity Church, 45 N. J. L., 230.
Parsell *vs.* State, 30 N. J. L., 530.
State *vs.* Pierson, 37 N. J. L., 363.
Alexander *vs.* Municipal Ct., 66 Cal., 387.
Hayward, Petitioner, 10 Pick., (N. Y.) 358.
Sammis *vs.* Brice, 4 Den., (N. Y.) 576.
People *vs.* Board of Police, 6 Hun., (N. Y.) 229; 52 How. Pr. (N. Y.) 289.
People *vs.* Fire Commissioners, 100 N. Y., 82.
Borough *vs.* Sewickley, 36 Pa. State, 90.
Freeman *vs.* School Directors, 37 Pa. State, 385.
Polk County *vs.* DesMoines, 70 Iowa, 351.
Midland County *vs.* Auditor General, 27 Mich., 165.
Ex parte Vallandigham, 1 Wall (U. S.) 249.

An appointment of a member of a board of supervisors by a county judge is a ministerial and not a judicial act, and cannot be reviewed by certiorari.

People *vs.* Bush, 40 Cal., 344.
Phelps Co. *vs.* Bishop, 46 Mo., 40.

Certiorari would not meet the case presented in the record because the writ lies only to review a judicial proceeding or a *quasi* judicial proceeding, and it is not the province of the certiorari to try the title of an office, nor will it lie to review a decision that has been executed by the party having been placed in the possession of the offices.

Throop Public Officers, Secs. 801, 802, 806 and 809.

In our analysis of the decision on the question of jurisdiction of a court of equity to interfere by its process of injunction, we have reached the conclusion that there are three classes of decisions bearing upon this question.

First: It is admitted by all of the decisions, that

a court of equity cannot try a title to an office.

Second: That a court of equity will not intervene to prevent the exercise of a right claimed by an official to remove an officer.

Third: That a court of equity will, in a proper case, enjoin one from disturbing the possesion, and protect the incumbent from ouster, when at the time of issuing the writ, the complainant is in full occupancy of the office, and in the discharge of its duties, until the claimant shall try his title at law.

The complainants claim, that the cases at Bar are within the reason and principle of the third class of cases; that in the rapid development in the latter part of this century of the social and material interests of the people, many latent principles of equitable jurisprudence have been applied to new cases, and courts of equity have within recent years exercised the power to review, even the exercise of discretionary power vested in a public officer, whenever its interference is necessary, in order to prevent abuse, injustice or oppression.

Hill *vs.* Thompson, 48 N. Y., (Suprm. Ct.) 481.
Davis *vs.* Mayer, *et al*, 1 Duer, (N. Y.) 451.
People *vs.* Sturtevant, 9 N. Y., 263.

Chief Justice Waite, in the case of Ex parte Sayer, 124 U. S. 223, in a dissenting opinion in that case gave expression to these views:

"I am not prepared to decide that an officer of a municipal government cannot, under any circumstances, apply to a court of chancery to restrain the municipal authorities from proceeding to remove him from his office without the authority of law. There may be cases, in my opinion, when the tardy remedies of *quo warranto*, *certiorari*, and other like writs will be entirely inadequate. I can easily conceive of circumstances under which a removal, even for a short period, would be productive of irremedial mischief. Such cases may rarely occur, and

> the propriety of such an application may not often be seen; but if one can arise, and if the exercise of the jurisdiction can ever be proper, the procedings of the court in due course upon a bill filed for such relief will not be void, even though the grounds on which it is asked may be insufficient."

If a case could be presented to the court, where an injury by removal, during the pendency of the proceeding at law, would be irreparable, and where no plain, adequate or complete remedy at law existed, the cases at bar would present that illustration, for under the acts of Congress the compensation of the officer would necessarily be lost during that period, as he was not "rendering actual service." The more recent authorities place this ground of equitable jurisdiction upon a higher plane, on that which involves the interest of the public and of society. The Court recognizes the autocratic power exercised by government officials over subordinates, whether they are acting within the scope of the power conferred upon them or not, but in the case of Guillott *vs.* Poicy, 41 La. An. 333, says:

> "It is in the interest of social peace and order and conforms to the object and policy of the law in all remedial provisions for the settlement of disputed rights, which always respects and maintains the *status quo* until the controversy shall be settled in the orderly course of judicial proceedure."

The Court further held that "an officer cannot be dispossessed by a third person, whose title he disputes, until the latter shall first try the disputed right. The reason is very obvious, why the claimant cannot take the law into his own hands, even with the assistance of others, and oust the incumbent in advance of judicial determination of the disputed right."

Mr. High, in his work on Injunctions, 1st edition, did not recognize this extent of equitable jurisdiction, but in his second edition, published as early as 1880, he appreciated the advance made by the courts of equity in extending their jurisdiction to cover such cases. He says in section 1315:

> "While, as is thus shown, courts of equity uniformly refuse to interfere by the exercise of their preventative jurisdiction to determine questions relating to the title to office, they frequently recognize and protect the possession of officers *de facto*, by refusing to interfere with their possession in behalf of adverse claimants, or, if necessary, by protecting such possession against the interference of such claimants. * * Upon the other hand, the actual incumbents of an office may be protected, pending a contest as to their title, from interference with their possession, and with the exercise of their functions. Thus, the officers *de facto* of a school district may restrain persons from claiming to be officers *de jure*, but who are not in possession, from taking possession of the school house, and from interfering with the plaintiffs in their employment of teachers, and in their managements of school affairs; and this notwithstanding the facts that the defendants thus enjoined claim to be the legally elected officers, and have instituted proceedings in *quo warranto* to establish their title. And the granting of an injunction in such case in no manner determines the question of title involved, but merely goes to the protection of the present incumbents against the interference of claimants out of possession, and whose title is not yet established."

In a recent work entitled American and English Decisions in Equity, third volume, page 440, the same principle is laid down that

> "The actual incumbent of an office whether *de jure* or *de facto*, if duly qualified, and if in office by virtue of a certificate of election issued by the proper officers, will be protected by injunction against interference with his possession thereof,"

and the author cites the following cases:

Braidy *vs.* Sweetland, 13 Kans., 41.
Braidy *vs.* Therett, 17 Kans., 469.
Guillott *vs.* Poicy, 41 La. An., 333.
Parmer *vs.* Foley, 45 How. Prac., (N. Y.) 110.
State *vs.* Superior Snohomish Co., (Wash.) 46 Pacific Reports, 441.
Wheeler *vs.* Board Fire Commissions, 46 La. An. 731.
Armitage *vs.* Fisher, 74 Hunt. (N. Y.) 167.
Kerr *vs.* Trego, 47 Penn., 292.
Board of Liquidation vs McComb 92 U.S. 541

Questions of fact arising upon the answer have been so thoroughly analyzed by the learned judge, who decided the cases below in his opinion, which is filed as a part of the record, that I refer the Court in the case of White *vs.* Berry, to the discussion of these facts. (Record, pages 41, 42, 43 and 44); in the case of White *vs.* Butler (Record, pages 43, 44, 45 and 46); and in the case of White *vs.* Ruckman (Record, pages 51, 52, 53 and 54.)

CHAS. J. FAULKNER,
For Appellees.

WHITE *v.* BERRY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

No. 589. Argued March 21, 22, 1898. — Decided May 31, 1898.

A court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is entrusted to a judicial tribunal.

The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error or appeal, or by mandamus, prohibition, quo warranto, or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure established by common law or by statute.

If the assignment of some one to duty as gauger at the Hannis distillery, in the place of the plaintiff, did not work his removal from office, a court of equity ought not to assume to control the discretion which under existing statutes the Executive Department has in all such matters; as interference by the judicial department in such cases would lead to the utmost confusion in the management of executive affairs.

This suit in equity was brought by H. C. Berry in the Circuit Court of the United States for the District of West Virginia against A. B. White, United States collector of internal revenue for that district, A. L. Hoult, John D. Sutton, Anthony Staubley and Franklin T. Thayer.

The bill alleged that in 1893, the plaintiff Berry was duly appointed by the Secretary of the Treasury to the position of United States gauger, and from that time to the commencement of this suit he had acted in that capacity at the Hannis distillery at Martinsburg, West Virginia;

That he was appointed through the recommendation of E. M. Gilkeson, late collector of internal revenue for the above-named district;

That he was paid at the rate of one hundred dollars per month directly from the Treasury Department, and was an officer of the United States Government, having taken the required oath of office and executed bond as required by law;

Statement of the Case.

That his oath of office and bond continued good and in force regardless of the personnel of the collector of internal revenue, and he did not hold his position at the discretion of that officer;

That he had honestly, faithfully and impartially discharged his duties, being especially well equipped and qualified to discharge all the duties appertaining to his office;

That the defendant White, collector of internal revenue, had declared his intention to appoint a gauger and three storekeepers to fill the place of the plaintiff and others employed at the distillery at an early date;

That the defendants Hoult, Sutton, Staubley and Thayer had been reinstated, or would be appointed and commissioned, and one of them would be assigned to duty in place of the plaintiff at the Hannis distillery, through White, who had openly declared his intention to reinstate the defendants in place of the plaintiff and others;

That the plaintiff is a Democrat in politics, was assigned to said office as a Democrat, and had voted the ticket of that political party, while the defendant White was a Republican;

That White had declared his intention to place one of the other four defendants in plaintiff's position, because of the latter's political affiliation, and for no other reason, and to appoint and recommend Republicans to fill such places for no other reason than that they were of that political faith;

That the plaintiff's office is in the classified service, and belongs to what is known as the Civil Service, and as such he could not be removed, except for cause shown and proved;

That by a circular issued by the Secretary of the Treasury, it was provided that no removals should be made from any position subject to competitive examination except upon just cause and upon written charges filed with the head of the department or the appointing officer, of which the accused should have full notice and opportunity to make defence;

That in department circular No. 119, which was an executive order, the same provisions were made together with others, and were signed by the acting commissioner of

internal revenue and approved by the Secretary of the Treasury;

That the plaintiff was one of the employés of the Treasury Department, was included in the classified service, and was protected from removal for political or religious reasons under the Civil Service laws and rules of the United States, as fully appears from a communication received from the acting president of the Civil Service Commission of date September 10, 1897;

That if the defendant White be permitted to remove the plaintiff from his office and position or supplant him by others, the same would be illegal and in violation of law;

That rule two of section three of the Civil Service rules provides that "no person in the executive Civil Service shall dismiss or cause to be dismissed or make any attempt to procure the dismissal of or in any manner change the official rank or position of any other person therein because of his political or religious affiliations;" while section one of those rules provides that any person in the executive Civil Service of the United States who should wilfully violate any provision of the Civil Service Act or of the rules established by the Civil Service Commission should be dismissed from office;

That under the law the plaintiff had a vested interest in his office, and if White should remove him therefrom or assist in so doing it would be in violation not only of the Civil Service rules but of the plaintiff's vested interest in his office, for which he would not have an adequate remedy at law;

That he is able, competent and willing to discharge the duties of his office, and is unwilling to be summarily dismissed therefrom for no other reason than that he is of opposite politics to those of the defendant White, collector of internal revenue;

That the said collector has no power, right or authority to remove the plaintiff from his office, or to appoint any other to take his place and thereby effect his removal; that the defendants Hoult, Sutton, Staubley and Thayer have no right or authority to take the oath of office and otherwise qualify and appear to take the position, and thereby assist in the

removal of the plaintiff, and as there were no vacancies created either by removals or resignations, and there being fifteen per cent now commissioned more than sufficient to perform the duties of storekeepers and gaugers in that district, if they were permitted so to do it would be in violation of law as well as of the rights and vested interests of the plaintiff; and,

That unless White be enjoined from so doing he will remove the plaintiff, and unless his codefendants are enjoined from qualifying as officers of the United States to take the place of the plaintiff at the distillery they would in that manner effect the removal of the plaintiff from his office, they having expressed their intention to accept such appointment and assignments.

The relief asked was an injunction restraining and prohibiting the defendant White, collector, and all others by and through him, "from removing him from the position of gauger until a vacancy is created according to law, as an officer of the United States aforesaid, and also from recommending, assigning and appointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfering with your complainant;" and also, that Hoult, Sutton, Staubley and Thayer and all other persons be enjoined, restrained and prohibited "from qualifying as gauger to take the place of your complainant at said distillery, or in any other way aid or assist in the removal of your said orator, or performing or discharging any of the duties of said office," and for such other and general relief as to equity might seem just and right.

In conformity with the motion by the plaintiff for a temporary restraining order, it was adjudged, ordered and decreed "that A. B. White, United States collector of internal revenue for the District of West Virginia, be and is hereby restrained, enjoined and inhibited from recommending, appointing or aiding in the appointment of A. L. Hoult, John D. Sutton, Anthony Staubley or any other person, to said position, and from removing the said complainant Berry aforesaid, until a vacancy therein is created by law, and from assigning and ap-

pointing any person to the same position, and from proceeding in the attempt to make such removal, and in any other manner interfere with the said complainant Berry in the said office, as aforesaid." It was further adjudged, ordered and decreed "that A. L. Hoult, John D. Sutton, Anthony Staubley and all other persons be, and they are hereby, enjoined and prohibited from acting as gauger in the place and stead of the said complainant Berry, as aforesaid, or in discharging any of the duties of the said office, until the further order of this court."

The answer of the defendants states that on the 30th day of September, 1897, the Commissioner of Internal Revenue made an order relieving plaintiff from assignment to duty as gauger at the Hannis distillery, and on the same day telegraphed the plaintiff to that effect; that on the same day the Commissioner telegraphed defendant Thayer, assigning him to duty as gauger at that distillery, and on the 1st day of October, 1897, he took charge as such gauger, and was in charge when defendant White, collector, visited the distillery on that day; that Thayer took charge before 8 o'clock in the morning of October 1st, and before the granting of the injunction, and before any service upon or other notice of any kind of the granting of or application for the injunction to Thayer, White or any of the defendants; that the recommendation of defendant White to the Commissioner, that the plaintiff be relieved from duty as aforesaid, was made prior to the institution of this suit; that it has been the general policy of the Internal Revenue Bureau to rotate the assignments of storekeepers and gaugers for the purpose of securing to such storekeepers and gaugers a fair proportion of employment and for the purpose of preventing collusion between distillery officials, and otherwise protecting the interests of the Government; that plaintiff having been on duty for a long time prior to the 30th day of September, 1897, as gauger, it was deemed by the Commissioner fair and right among the several gaugers, and for the best interests of the public service, to relieve plaintiff from assignment to duty at the Hannis distillery.

Admitting in their answer that the plaintiff was an officer

of the United States, duly appointed and commissioned, and that he did not hold his position at the discretion of the collector of internal revenue, the defendant White denied that the plaintiff was well equipped and qualified to discharge all the duties of gauger, but that from the records of his office and of the Department for the previous three months, during which he has been collector, the plaintiff was not a first-class gauger, and was culpably careless in his work, and that it was largely because of information he had received that defendant White recommended to the Commissioner that the plaintiff be relieved from duty as gauger at that distillery; that the defendant White, as collector, had never declared his intention to appoint any one of the other defendants or any one else a storekeeper or gauger, knowing full well and recognizing the fact that storekeepers and gaugers are and can be appointed by the Secretary of the Treasury only; that the Secretary of the Treasury reinstated Hoult as gauger, Staubley as storekeeper, and Thayer as gauger in 1897, in accordance with the laws of the United States and in accordance with the Civil Service law, each having first been certified as eligible to such reinstatement by the Civil Service Commission; and that Hoult, Sutton, Staubley and Thayer had all been duly commissioned and executed bonds and qualified prior to the institution of this suit; and that defendant White never declared his intention to reinstate any of said officers or assign them to duty in the place of the plaintiff, recognizing fully that he had no such authority, and that neither Hoult nor Staubley had been assigned to duty since their reinstatement.

The defendant White admitted that he was a Republican in politics, and the defendants admitted that the plaintiff was a Democrat in politics. White denied that he ever signified or declared his intention to remove the plaintiff from office or put the defendants or any one else in his place, for the reason that the plaintiff was a Democrat in politics, and for no other reason to appoint or recommend in his stead a Republican; that in fact and in law he could have nothing to do with the removal or appointment of a storekeeper or a gauger unless it be to recommend the same; that in short the appointments

of storekeepers and gaugers and their removals could be made only by the Secretary of the Treasury.

The defendants alleged that the revocation of assignment complained of by the plaintiff was made by the Commissioner, whom the defendants understood was a Democrat.

The defendants admitted that the office of gauger held by the plaintiff was in the classified service, and belonged to what was known as the Civil Service; but alleged that so far as they knew the plaintiff had not been removed, but on the contrary still held the position of United States gauger; that the fact that he had been relieved from assignment to duty at the Hannis distillery did not remove him from office; that he might be assigned to duty or transferred or non-assigned at any time by the Commissioner of Internal Revenue; that the plaintiff could not in this manner question the right of the Commissioner to assign a United States gauger at a distillery or relieve one who has already been assigned; that the Commissioner had the right to assign to duty a United States gauger, and to determine how long he shall remain on duty under such assignment; and that no law, executive order, or rule or regulation of the Civil Service Commission was violated by the Commissioner doing as he had done in this case in exercising the authority conferred upon him by the acts of Congress by assigning a gauger to duty at the said distillery and relieving from duty the plaintiff, who had been theretofore assigned to duty at the same distillery by the Commissioner and by the same act of Congress.

The defendants admitted that the plaintiff was willing to continue in office, but the defendant White charged that he was a careless officer, and that if any attempt was or should be made to remove or dismiss him from the service, it would not be for the reason that he was of opposite politics to those of the collector.

The answer concludes:

"Replying to allegation No. 13 in plaintiff's bill, the defendants again say that the defendant White claims no right or authority to remove the said plaintiff from office or to appoint any one in his place, and that he never has claimed

any such authority. The defendants say that the defendants Hoult, Sutton, Staubley and Thayer, having been duly appointed to the positions respectively held by each of them by the Secretary of the Treasury the right to hold said positions cannot be questioned in this or any other collateral proceeding; that the question of whether there were or were not vacancies at the time these appointments were made cannot be determined in this suit. Neither of said defendants Hoult, Sutton, Staubley or Thayer was appointed in place of the plaintiff. The appointment of neither could affect the plaintiff, and whether the Secretary of the Treasury has more of these officers in commission than he is entitled to have under the law is not a question which can be raised by the plaintiff in this suit. It cannot be ascertained in this proceeding whether or not 15 per cent or any other number of officers are now in commission more than are sufficient to perform the duties of storekeepers or gaugers in this collection district. This court, it is respectfully suggested, will not undertake to ascertain the number of distilleries in operation and to be placed in operation in said collection district and the number of storekeepers and gaugers to be placed on duty at such distilleries. It is submitted that these are questions to be determined by the Treasury Department, and must be supposed to have been determined before such appointments were made, and the appointments made in conformity to the interests and requirements of the public service. Defendants therefore deny that by the appointment of the defendants Hoult, Sutton, Staubley and Thayer more storekeepers and gaugers were placed in commission than were sufficient to perform the duties of such officers in said district.

"The defendants deny that the appointment and qualification of said Hoult, Sutton, Staubley and Thayer will make necessary the removal of the plaintiff. The defendants, further answering, say that the defendant Hoult was on the — day of ——, 1889, appointed a United States gauger; that on the — day of ——, 1893, after having served about four years, and there having been a change of administration, he was removed from said position through no delinquency or

misconduct of his; that during the late war of the rebellion he served in the military service of the United States, and was honorably discharged therefrom; that availing himself of Rule IX of the Civil Service regulations, he made application to the Secretary of the Treasury to be reinstated to the position from which he had been removed; that defendants are informed that said petition, together with the requisition of the proper officer of the Treasury Department, were referred to the Civil Service Commission, and his eligibility having been properly certified by said Commission, he was reinstated and reappointed by the Secretary of the Treasury. Said petition was originally filed with E. M. Gilkeson, late collector of internal revenue, and, together with the recommendation of said collector, forwarded to the Commissioner of Internal Revenue. The defendants insist that in making said appointment or reinstatement the Secretary of the Treasury acted in strict conformity with the acts of Congress and the rules and regulations of the Civil Service Commission. The defendants Sutton, Staubley and Thayer were similarly reinstated and reappointed as storekeepers and gauger. The defendant A. B. White says that the recommendation made by him to the Commissioner of Internal Revenue relative to the plaintiff was made prior to or on the 29th day of September, 1897, and the said recommendation was made in part because the said plaintiff had been on duty for some time, and in part for the reasons hereinbefore stated. Said defendants further say that they believe and charge that the reinstatement and appointment of said defendants Hoult, Sutton, Staubley and Thayer were not made by the Secretary of the Treasury for political reasons, nor was the plaintiff relieved from duty as aforesaid at the Hannis distillery by the Commissioner of Internal Revenue for political reasons, nor the said Thayer assigned to duty at the said distillery for political reasons."

The cause having been heard upon the bill, the demurrer to the bill, the answer and a general replication thereto, the affidavits filed by the parties, and upon the plaintiff's motion to perpetuate the injunction theretofore granted, a final order was made "restraining and inhibiting the defendant White,

the collector of the district, the appointing power, the defendant Thayer, and all others, from in anywise interfering with the plaintiff H. C. Berry in the possession of his office and in the discharge of his duty as gauger at the Hannis distillery, located in the town of Martinsburg, W. Va., until he shall be removed therefrom by proper proceedings had under the Civil Service Act and the rules and regulations made thereunder or by judicial proceedings at law; and the said collector having applied heretofore to the court for leave to the Commissioner to appoint temporarily a gauger pending this litigation, he, the said collector, is required and directed to recommend and the Commissioner of Internal Revenue to transfer the temporary gauger heretofore assigned, and to permit the said gauger Berry undisturbed to discharge the duties of his office as gauger, unless hereafter removed as hereinbefore provided."

Mr. Assistant Attorney General Boyd and *Mr. Joseph H. Gaines* for appellants.

Mr. Charles J. Faulkner for appellee.

Mr. Justice Harlan, after stating the case, delivered the opinion of the court.

In the opinion delivered by the learned District Judge, who heard this and other cases involving the same questions as those now presented, it was held: 1. That the act known as the "Civil Service Act" was constitutional. 2. That Congress has not delegated to the President and the Commission legislative powers. 3. That by rule 3, section 1, the internal revenue service has been placed under the Civil Service Act and rules made in pursuance of it. 4. That the plaintiffs in these actions are officers of the Government in the internal revenue service. 5. That they cannot be removed from their positions except for causes other than political, in which event their removal must be made under the terms and provisions of the Civil Service Act and the rules promulgated under it,

which, under the act of Congress, became a part of the law. 6. That the attempt to change the position and rank of the officers in these cases was in violation of law. 7. That a court of equity has jurisdiction to restrain the appointing power from removing the officers from their positions if such removals are in violation of the Civil Service Act. 83 Fed. Rep. 578.

On behalf of the Government it is insisted that the Circuit Court of the United States, sitting in equity, was without jurisdiction to entertain this suit and to grant the relief asked in the bill. If this position be well taken, it will be unnecessary to consider the other questions discussed in the able and elaborate opinion of the District Judge.

In *Sawyer's case*, 124 U. S. 200, 223, Chief Justice Waite, in a dissenting opinion, said that he was not prepared to hold that an officer of a municipal government could not, under any circumstances, apply to a court of chancery to restrain the municipal authorities from proceeding to remove him from his office without authority of law; that there might be cases when the tardy remedies of quo warranto, certiorari and other like writs would be entirely inadequate. In that view of the jurisdiction of equity the writer of this opinion concurred at the time the court disposed of that case.

But the court in its opinion in that case observed that under the Constitution and laws of the United States the distinction between common law and equity, as existing in England at the time of the separation of the two countries, had been maintained, although both jurisdictions were vested in the same courts, and held that a court of equity had no jurisdiction over the appointment and removal of public officers, and that to sustain a bill in equity to restrain or relieve against proceedings for the removal of public officers would invade the domain of the courts of common law, or of the executive and administrative departments of the government.

After referring to numerous authorities, American and English, in support of the general proposition that a court of chancery had no power to restrain criminal proceedings, unless they had been instituted by a party to a suit already

pending before it, and to try the same right that was in issue there, the court proceeded: "It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers, whether the power of removal is vested, as well as that of appointment, in executive or administrative boards or officers, or is entrusted to a judicial tribunal. The jurisdiction to determine the title to a public office belongs exclusively to the courts of law, and is exercised either by certiorari, error or appeal, or by mandamus, prohibition, quo warranto or information in the nature of a writ of quo warranto, according to the circumstances of the case, and the mode of procedure established by common law or by statute. No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer. But an information in the Court of Chancery for the regulation of Harrow School within its undoubted jurisdiction over public charities was dismissed so far as it sought a removal of governors unlawfully elected, Sir William Grant saying: 'This court, I apprehend, has no jurisdiction with regard either to the election or a motion of corporators of any description.' *Attorney General* v. *Clarendon*, 17 Ves. 488, 491. In the courts of the several States the power of a court of equity to restrain by injunction the removal of a municipal officer has been denied in many well-considered cases," — citing *Tappan* v. *Gray*, 3 Edw. Ch. 450, reversed by Chancellor Walworth on appeal, 9 Paige, 507, 509, 512, whose decree was affirmed by the Court of Errors, 7 Hill, 259; *Hagner* v. *Heyberger*, 7 Watts & Serg. 104; *Updegraff* v. *Crans*, 47 Penn. St. 103; *Cochran* v. *McCleary*, 22 Iowa, 75; *Delahanty* v. *Warner*, 75 Illinois, 185; *Sheridan* v. *Colvin*, 78 Illinois, 237; *Beebe* v. *Robinson*, 52 Alabama, 66; and *Moulton* v. *Reid*, 54 Alabama, 320.

The rule established in *Sawyer's case* was applied in *Morgan* v. *Nunn*, 84 Fed. Rep. 551, in which Judge Lurton said that "a court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee, nor restrain the appointment of another." Similar decisions have been made in other Circuit Courts of

the United States; by Judges Pardee and Newman, in *Couper* v. *Smyth*, Northern District of Georgia, 84 Fed. Rep. 757; by Judge Kirkpatrick, in *Page* v. *Moffett*, District of New Jersey, 85 Fed. Rep. 38; by Judge Jenkins, Northern District of Illinois, in *Carr* v. *Gordon*, 82 Fed. Rep. 373, 379, and by Judge Baker, District of Indiana, in *Taylor* v. *Kercheval*, 82 Fed. Rep. 497, 499.

If the assignment of some one to duty as gauger at the Hannis distillery, in the place of the plaintiff, did not work his removal from office, a court of equity ought not to assume to control the discretion which under existing statutes the Executive Department has in all such matters. Interference by the judicial department in such cases would lead to the utmost confusion in the management of executive affairs.

But the plaintiff contends that the assignment of some one to duty in his place at the Hannis distillery is, in effect, a removal of him from his office in violation of law, and that the object of the proceedings against him was to bring about that result. But, under the authorities cited, such proceedings cannot be restrained by a court of the United States, sitting in equity, and therefore the court below erred in passing the final decree which has been brought here for review.

Without expressing any opinion upon other questions so fully discussed by counsel, we hold that the Circuit Court, sitting in equity, was without jurisdiction to grant the relief asked.

The decree below is reversed, and the cause is remanded with direction to dismiss the bill.

Mr. Justice McKenna took no part in the decision of this case.

WHITE *v.* BUTLER.

WHITE *v.* RUCKMAN.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WEST VIRGINIA.

Nos. 540, 541. Argued March 21, 22, 1898. — Decided May 31, 1898.

White v. *Berry*, *ante*, 366, affirmed and followed.

THE case is stated in the opinion.

Mr. Assistant Attorney General Boyd and *Mr. Joseph H. Gaines* for appellants.

Mr. Charles J. Faulkner for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

Butler, the appellee in the first of the above cases, was a storekeeper of the United States at the Hannis distillery at Martinsburg, West Virginia.

Ruckman, the appellee in the second case, was also a storekeeper at the same distillery.

The bill in each case is substantially like that in *White* v. *Berry*, *ante*, 366, just decided. The relief asked by Butler and Ruckman is the same as that asked by Berry, and the decree rendered in behalf of each was the same as that rendered in *Berry's case.*

For the reasons stated in the opinion just delivered in *White* v. *Berry*, the decree in each of the above cases must be

Reversed, and the causes remanded with directions to dismiss the bills.